82-794

No. 82__

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MILDRED PETERS, *et al.*,

*Petitioners,*

—v.—

WAYNE STATE UNIVERSITY, TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is the term "employer", as it is used in Title VII, sufficiently broad to encompass Teachers Insurance Annuity Association and College Retirement Equities Fund (TIAA-CREF), an educational service organization which exists solely for the purpose of providing pension benefits to the employees of colleges and universities?

2. Was it a violation of Title VII, under the reasoning of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), for Wayne State University and TIAA-CREF jointly to operate an employee retirement plan which pays smaller periodic pension benefits to women, solely because of their sex?

3. Did the Court of Appeals below erroneously apply the evidentiary formula contained in Texas Department of Communi-

ty Affairs v. Burdine, 450 U.S. 248 (1981), to a case contesting the legality of an overt sex-based classification which results in the payment of smaller periodic pension benefits to women?

## PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption, with the exception of seventy-seven additional named individuals representing the certified class of all past and present women employees of Wayne State University who have participated or are participating in the TIAA-CREF retirement program provided by defendant Wayne State University to its employees.[1/]

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1/ In addition to Mildred Peters, named class representatives include the other following individuals: Jeanne S. Allen, Effie Ambler, Annie S. Pall, Mary Jane Bigler, Margaret B. Canty, Patricia Ann Clay, Cynthia M. Colvin, L. Ann Conley, Joanne V. Creighton, Patricia Dates, Betty E. Denson, Domenica T. Di Sante, Mary Eilers, Jane Fink, Lorene R. Fischer, Virginia W. Gay, Joella H. Gipson, Celia Goodman, Marilyn Heins, Gladys Hogland, Marqueta C. Huyck, Shirley M. Jackson, Erica Janzen, Dorothy H. Johnson, Sara Ann Johnson, Bernice A. Kaplan, Elinor P. Keresey, Ruth M. Klein, Shirley Kmetz, Stefanie Kubiak, Jane F. La Cour, Ellen Laramie, Sara Leopold, Mary W. Mahr, Grace Mattheiss, Alexandra McCoy, Eleanor McCrae, Janet H. McKnight,
(footnote continued on following page)

Florence Mills, Ruth F. Morrissey, Carolyn E. Navarre, Emilie A. Newcomb, Louise Nobili, Catherine T. Oddo, Ann T. Parker, Myrtle L. Peart, Lois Pettit, Margarita J. Prado, Ruth Alice Rosen, Margaret U. Ross, Carol W. Scott, Doris Seifert, Eva S. Settino, Norma Shifrin, Frances Slongo, Fay H. Smith, Gloria L. Sniderman, Justine J. Speer, Jean Stanicek, Dolores J. Stevens, Mona Torp, Carolyn B. Trent, Beverly A. Tyler, Pearl L. Warn, Darimell Waugh, Hedwig E. Whitman, Jean I. Widger, Virginia M. Wood, Halyna Wowk, Anne Y. Zimmer, Sylvia M. Blank, Evelyn E. Holtorf, Thelma Gray James, Dorothy M. La Salle, Leonor McAlpine, Ethel P. Potter, and Ida J. Searles, individually and on behalf of all other persons similarly situated.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, issued on October 14, 1982, is not yet reported, but is set forth in Petitioners' Appendix at pp. A-1 through A-10. The opinion of the United States District Court for the Eastern District of Michigan is reported at 476 F. Supp. 1343 (E.D. Mich. 1979), and is set forth in Petitioners' Appendix at A-11; its judgment, dated September 25, 1979, and order dated October 26, 1979, are set forth in Petitioners' Appendix at A-47 and A-49, respectively. The judgment of the Court of Appeals, entered on October 14, 1982, is set forth at A-53.

The opinion of the Court of Appeals for the Second Circuit in Spirt v. TIAA-CREF, issued on September 29, 1982, is not yet reported, but is set forth in Petitioner's Appendix at A-55.

## JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1), to review a judgment of the Court of Appeals entered on October 14, 1982.

## STATUTE INVOLVED

This case involves several provisions of Title VII of the Civil Rights Act of 1964, as amended.

Section 703(a), 42 U.S.C. §2000e-2(a), provides in relevant part as follows:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 701(b), 42 U.S.C. §2000e(b), provides in relevant part as follows:

For the purposes of this subchapter -

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

## STATEMENT OF THE CASE

Retired and current women employees at Wayne State University brought this class action[2/] against defendants Wayne State University and Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF), challenging the discriminatory nature of their employee pension plan under Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

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2/ The district court certified the case as a class action on April 8, 1977, and defined the class as follows:

> "All past and present women employees of defendant Wayne State University who have participated or are participating in the TIAA-CREF retirement program provided by Wayne State University to its employees."

§2000e-2(a).[3] The pension plan uses sex-based mortality tables to calculate the periodic pension benefits to which plan participants are entitled upon retirement. As a result, women employees, who make contributions equal to those of similarly situated men employees, receive smaller monthly pension benefits upon retirement than do similarly situated retired men.

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[3] Charges of sex discrimination were first filed with the Equal Employment Opportunity Commission in 1973. The initial complaint was filed on January 27, 1976, in the United States District Court for the Eastern District of Michigan, and the amended complaint, adding defendant TIAA-CREF, was filed on February 22, 1977. In addition to the Title VII claim, plaintiffs asserted a claim under 42 U.S.C. §1985(3). The jurisdiction of the district court was invoked under Title VII Sections 706(f) and (g), 42 U.S.C. §2000e-5(f) and (g), and under 28 U.S.C. §§1343(1), 2201 and 2202. The district court dismissed the §1985(3) claim, however, and plaintiffs did not appeal the district court's judgment of dismissal.

TIAA and CREF manage, on a non-profit basis, retirement plans which are exclusively available to and especially designed for faculty and staff members of institutions of higher education. Peters v. Wayne State University, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), Petitioners' Appendix at A-20.[4/]

At the time of the district court's decision, the TIAA-CREF system had annuity contracts with 550,000 employees at 3100 educational institutions, and was paying pensions to approximately 65,000 retired teachers and staff.

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4/ Hereinafter, citations to Petitioners' Appendix are denominated (A- ).

Each plan in the TIAA-CREF system is established by a resolution of the educational institution's governing board. The institution establishes, with advice from TIAA-CREF, provisions governing employee eligibility and participation, waiting periods, employee and employer contribution rates, prior service benefits, and the age of retirement. As described by TIAA-CREF in its publication entitled "Planning A Retirement System,"

> The resolution becomes a working agreement between the institution and the participants in its retirement plan. The TIAA retirement annuity contract and the CREF certificate provide a contractual agreement between the participant and TIAA-CREF. There is no need for a master contract with the institution. (Plaintiffs' Exhibit (PX) 23).

Under the Wayne State retirement plan, the university deducts 5% from the salary of each employee, and itself contributes 10% of each employee's salary,[5] which amounts, plus interest and discretionary dividends, TIAA-CREF credits to individual employees' accounts.

Upon retirement, the employee has no right to receive a lump sum payment for the full value of contributions paid into the fund.[6] Instead, the accumula-

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5/ Since 1962, participation in the TIAA-CREF plan by Wayne State employees has not been mandatory, although the university will not make its 10% contribution to any other plan. The university contribution is forfeited by any employee who declines to participate.

6/ If the employee dies before reaching retirement age, the accumulated funds are payable to a beneficiary as a death benefit. TIAA-CREF offers a 10% cash option at retirement, contingent upon the approval of the institution from which the employee retired. The cash option was not intended to permit the employee to purchase an outside annuity. It was intended to cover special transition needs. Dist. Ct. Op., 476 F. Supp. at 1350 n. 15, (A-38).

ted totals in the employee's account at retirement are used to calculate annuity benefits. TIAA calculates the amount of money to be received monthly as a "fixed benefit,"[7/] and CREF calculates the benefits to which an employee will be entitled under the variable annuity program. These calculations are based in part on sex-based mortality tables. Because women as a class live longer than men as a class, women as a group are expected to receive annuity payments over a longer period of time than men as a group. The use of tables which reflect

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7/ Notwithstanding the absence of any contractual guarantee mandating payment of dividends, an employee's actual retirement benefits are based, in substantial part, on discretionary dividends paid by TIAA. For persons retiring in 1976, for example, TIAA paid $1633, including dividend additions, for every $1000 of yearly contractual income. PX 21, pp. 7-8.

this male-female group difference causes women retirees, who have made pension contributions that are equal to those made by similarly-situated men, to receive monthly payments that are smaller than those received by their male counterparts.[8/]

After a trial on the issue of liability, but before the district court's decision, this Court decided Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), in which an employer practice of withholding more from women's salaries than from men's salaries for

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8/ A retiree can opt for receiving benefit payments for the duration for his or her own life (single life annuity), or a single life annuity with a ten or twenty year guaranteed period, or a joint-life option, under which benefits will continue throughout the lives of both the retiree and a named beneficiary. All available annuity options use sex-based mortality tables to compute benefits.

pension plan contributions was held to constitute unlawful sex discrimination under Title VII. Applying Manhart, and EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978), which held the reasoning of Manhart applicable to the unequal payment of TIAA-CREF pension benefits, the district court, on September 25, 1979, issued its opinion and judgment. The district court declared that the Wayne State University TIAA-CREF retirement plan violates Title VII, and enjoined Wayne State University and TIAA-CREF from "further use of sex-segregated mortality tables in computing periodic retirement payments."[9/]

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9/ The injunction was stayed pending appeal by order of the district court dated October 26, 1979. (A-49).

The district court rejected defendants' argument that the Wayne State University TIAA-CREF retirement plan is not an employer-operated plan within the meaning of Title VII, finding instead that TIAA-CREF exists solely to provide retirement benefits to employees of eligible educational institutions, and that the "ties between Wayne State University and TIAA-CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. (A-39). The district court also rejected TIAA-CREF's post-trial argument that because of the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq., its use of sex-based mortality

tables is immune from challenge under Title VII.[10/]

Because the trial was held solely on the liability issue, the district court reserved issues of monetary relief for further proceedings. The district court stated, however, that because defendants had not acted in bad faith, any monetary relief granted would extend

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10 / Section 2(b) of the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. §1012(b), states in relevant part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

only from the date Manhart was decided, April 25, 1978, to the present. See Judgment dated September 25, 1979, and Order of October 25, 1979. (A-47, A-49). Both TIAA-CREF and Wayne State appealed.

On October 14, 1982, the Court of Appeals for the Sixth Circuit reversed the district court's judgment below, concluding that neither TIAA-CREF nor Wayne State University had violated Title VII. The Sixth Circuit panel did not discuss, but did acknowledge, a recent Second Circuit decision to the contrary.[11/]

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11/ On September 29, 1982, the Court of Appeals for the Second Circuit enjoined TIAA-CREF from using sex-based mortality tables to compute retirement benefits. It also upheld the injunction against Long Island University prohibiting its participation in a plan which used sex-based tables. Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. September 29, 1982), slip op. at 5035, 5067. (A-55, A-87).

The Sixth Circuit panel first held that TIAA-CREF is not an employer within the meaning of Title VII, but is instead an insurance company "furnishing its services to a Title VII employer." (A-4). The Court of Appeals then held, as to Wayne State University, that despite this Court's contrary holding in Manhart, "the use of sex-based mortality tables does not violate Title VII if the actuarial value of the annuities is equal for similarly situated men and women." Slip Op. at 5. (A-5). Concluding that the plan differentiates between men and women solely on the basis of longevity, and that the actuarial value of the annuities is equal for women as a group and men as a group, the Court of Appeals found that "there is no evidence that Wayne State treats women less favorably than men because of their sex." Id.

In its analysis, the Court of Appeals erroneously applied the evidentiary guidelines established in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), to assist in the fact-finding search for discriminatory purpose, and held that Wayne State rebutted plaintiffs' prima facie showing of sex discrimination by articulating the "legitimate non-discriminatory reason" of the greater average longevity of women. The Court of Appeals further held that plaintiffs failed to carry their ultimate burden of persuasion on the issue of discriminatory purpose under Burdine analysis because "[p]laintiffs did not show that Wayne State University's reliance on longevity was a pretext to mask its intention to disadvantage and harm female annuitants." Slip Op. at 7. (A-7). In effect, the Court of

Appeals below incorrectly treated this Title VII case as though no overt sex-based classification existed, and in flat disregard of more than a decade of this Court's rulings to the contrary, failed to acknowledge that such classifications themselves establish the requisite discriminatory purpose.

This timely petition for writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

This case poses important questions of statutory construction under Title VII which are not encompassed by the questions presented for review in Arizona Governing Committee v. Norris, No. 82-52 (cert. granted October 12, 1982), and which are now the subject of directly conflicting decisions by federal courts of appeals.

Unlike the Norris case, the instant case raises the important question of the meaning of the term "employer" as it is used in Title VII, i.e., the scope of Title VII's application outside

the conventional employer-employee relationship.[12] Like Norris, this case raises Title VII liability issues, including what constitutes unlawful discrimination under Title VII, which require application and clarification of the Court's decision in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978). However, this case presents such issues in a factual context much more typical of the numerous pension discrimination cases pending in

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12 / Because of its disposition of the Title VII "employer" and other liability issues, the Court of Appeals did not address the argument raised by TIAA-CREF, and rejected by the district court below, that the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq., immunizes TIAA-CREF from liability under Title VII. If this Court grants this petition, and reverses the judgment of the Court of Appeals below, it would be appropriate to remand the case in part to the Court of Appeals for consideration of the McCarran-Ferguson Act issue. See Spirt v. TIAA, supra, slip op. at 5053-5059 (McCarran-Ferguson Act does not render Title VII inapplicable to TIAA-CREF). (A-73 to A-79).

the lower courts.[13/]

First, unlike the deferred compensation plan at issue in Norris, the employees here have no right to receive a lump sum payment of the full value of contributions paid into the fund. Second, the employer here makes substantial contributions to the employee pension fund.

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13/ See generally, e.g., Spirt v. TIAA-CREF, supra; Retired Public Employees' Ass'n of California v. California, 677 F.2d 733 (9th Cir. 1982), petition for cert. filed, No. 82-262 (Aug. 14, 1982); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (TIAA-CREF plan); Probe v. State Teachers Retirement System, 27 FEP Cases 1306 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 FEP Cases 527 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 FEP Cases 995 (C.D. Cal. 1980); Johnston v. Purdue University, (N.D. Ind. C.A. No. L 80-4); EEOC v. Marquette University (E.D. Wis. C.A. No. 78-C-572); EEOC v. Columbia University and TIAA-CREF, 78 Civ. 4420 (TPG); Michigan State University Faculty Association v. Michigan State University (W.D. Mich., C.A. No. C-76-640 CA5): American Nurses Association v. TIAA-CREF and University of North Carolina (N.D. N.C. C.A. No. C-75-558-6); Bailey v. University of Southern California (C.D. Calif. C.A. No. 75-3862).

Third, the pension fund at issue here is administered by an organization which was created solely, and exists symbiotically, to serve the employee pension plan needs of the employer.

Resolution of the issues presented by this case ultimately affects over 600,000 individuals and over 3100 educational institutions in the TIAA-CREF system, and will determine the outcome of numerous other cases pending in the lower courts, making desirable an early and definitive ruling by this Court. Accordingly, petitioners respectfully urge the Court to grant review in the instant case and to set this case for argument in tandem with Arizona Governing Committee v. Norris.

## I. The Court Of Appeals Decision Below Construes The Term "Employer" As Used In Title VII Too Narrowly, And Directly Conflicts With A Decision Of The Court Of Appeals For The Second Circuit

The Court of Appeals below applied an erroneous definition of the term "employer" in holding that TIAA-CREF cannot be deemed an employer within the meaning of Title VII. Its decision results in a direct conflict with the Second Circuit's decision in Spirt v. TIAA-CREF on the same issue, and poses the question of Title VII's application where the employer has delegated a portion of its traditional responsibility and authority to a third party. See Manhart, supra at 718 n. 33.

Title VII's coverage, by its terms, extends beyond the conventional employer-employee relationship.[14] Relying on Title VII's language and on the broad, remedial intent of Congress,[15] the

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14/ Title VII defines the term "employer" very broadly as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." 42 U.S.C. §2000e-(b). Significantly, rather than prohibiting discrimination against "employees," Section 703(a) of Title VII provides that it shall be an unlawful employment practice for an employer to discriminate against any "individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . [emphasis added]. 42 U.S.C. §2000e-2(a).

15/ Congress intended that Title VII be construed liberally in order to achieve its comprehensive remedial purpose of eradicating discrimination in employment. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975).

term "employer" has been construed to encompass parties who significantly affect access to employment opportunities,[16] or who are so intertwined with the direct employer that they jointly act to cause or perpetuate the discrimination.[17]

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16/ Title VII's comprehensive definition of equal employment opportunities includes access to equal compensation as well as access to jobs. See County of Washington v. Gunther, 452 U.S. 161, 68 L.Ed 2d 765 (1981); Spirt v. TIAA-CREF, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), aff'd (Nos. 79-7715, 79-7737, 79-7739), slip op. at 5052-5053 (2d Cir. Sept. 29, 1982).

17/ E.g., Spirt v. TIAA-CREF, supra; Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Hannahs v. New York State Teachers Retirement System, 26 FEP Cases 527, 532 (S.D.N.Y. 1981); Vanguard Justice Society v. Hughes, 471 F. Supp. 670 (D. Md. 1979); Puntolillo v. New Hampshire Racing Commission, 375 F. Supp. 1089 (D.N.H. 1974); see also Baker v. Stuart Broadcasting Co., 560 F.2d 389,391 (8th Cir. 1977); EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1261-62 (N.D. Ohio 1981); Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (D. Me. 1977); Hairston v. McLean Trucking Co., 62 F.R.D. 642, 662-4 (M.D.N.C. 1974), vacated on other grounds, 520 F.2d 226 (4th Cir. 1975).

Applying this construction in Spirt v. TIAA, the Court of Appeals for the Second Circuit ruled that "TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities . . . that they must be deemed an 'employer' for the purpose of Title VII." Spirt v. TIAA-CREF, supra, slip op. at 5052. (A-72).

In the instant case, however, the Court of Appeals narrowly limited the term "employer" to parties who may be held liable as employers or agents at

common law.[18] Such a limiting construction conflicts with Congressional intent that Title VII be liberally construed to achieve its comprehensive remedial purpose, and invites abuse. As this Court cautioned in Manhart, 435 U.S. at 718 n. 33, "[w]e do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." Petitioners accord-

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18/ The district court found below that TIAA-CREF's "sole reason" for existence is to provide retirement and other benefit plans for institutions of higher education, and that TIAA-CREF is closely "intertwined" with the institutions that it serves. The district court thus rejected TIAA-CREF's argument that it acts solely as an insurer and not as an employer within the means of Title VII. The Court of Appeals reversed the district court's finding as "clearly erroneous," applying its narrow common law construction of the term "employer" under Title VII. On virtually identical factual findings, the Second Circuit, applying a broader definition of the term "employer", upheld the district court's holding therein that TIAA-CREF could be deemed an employer within the meaning of Title VII. See Spirt v. TIAA-CREF, supra, slip op. at 5052.

ingly urge this Court to grant the writ in order to resolve the conflict in the federal courts of appeals and to correct the erroneous decision below.

## II. The Court Of Appeals Below Disregarded Los Angeles Dept. Of Water & Power v. Manhart And Misapplied Texas Department Of Community Affairs v. Burdine By Holding That The Use Of An Overt Sex-Based Classification To Compute Employee Pension Plan Benefits Does Not Violate Title VII So Long As The Actuarial Value Of The Annuities Is Equal For Women And Men As As A Group

### A. This Case Is Controlled By Manhart

In Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), this Court invalidated an employer's practice of requiring women employees to make larger contributions to its pension plan than male employees, where the contribution amounts were computed using sex-based mortality tables which reflected the greater average longevity

of women as a group. This Court established basic principles in Manhart, which are fully applicable to the instant case. After Manhart, it is clear that 1) Both employee contributions to pension plans and employee pension benefits are "compensation" within the meaning of Title VII;[19] 2) Title VII requires fairness to individuals, rather than fairness to classes (rejection of the "actuarial equality" argument);[20] and 3) although

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19/ Manhart, 435 U.S. at 712 n. 23 ("The Department's pension benefits, and the contributions that maintain them, are 'compensation' under Title VII.").

20/ 435 U.S. at 712-716.

the employer's cost of providing equal benefits to respective classes of employees may vary, the periodic payments or compensation received by similarly situated individual employees must be equal.[21] The Court of Appeals below flatly disregarded each of these principles when it held that Wayne State University did not violate Title VII by providing its employees with a retirement plan which utilizes sex-based mortality tables to compute periodic pension benefits. Moreover, its decision relies upon arguments which are explicitly rejected in Manhart.

First, the Court of Appeals erroneously attempted to distinguish Manhart by observing that the Court's

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21/ 435 U.S. at 718, and 718 n. 34.

"primary concern" in Manhart, that "women received smaller paychecks for the same work, is not a factor in the present case." Slip op. at 8. (A-8). Under the university's defined contribution plan, the take-home pay of men and women employees is the same, but the pension benefits are unequal. According to the Sixth Circuit, the employees receive equal compensation, even though pension plan benefits are unequal. This restriction of the term "compensation" to mean take-home pay directly conflicts with this Court's decision in Manhart, and with the language of Title VII. In the employment context, payment of sex or race differentiated retirement benefits constitutes discrimination just as invidious as take-home pay differentials based solely on the sex or race of the

employee.[22/] Every court which has considered the issue, with the exception of the Court of Appeals below, has held that Title VII mandates equal employee retirement benefits

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22 / As the Second Circuit noted in Spirt v. TIAA, supra, slip op. at 5048-5049, "if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plans that is more in conflict with the spirit and purposes of Title VII." The lesser benefit is received at a time when recipients often must live for an indefinite time on a fixed income and when "the amount of dollars available to her is apt to crucially affect her ability to meet her basic needs." (A-68, A-69).

as well as equal employee contributions.[23/]

Second, the decision below directly conflicts with Manhart by holding that payment of smaller pension benefits to retired women workers does not violate Title VII because women as a class live

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23/ E.g., Spirt v. TIAA-CREF, supra; Retired Public Employees' Association of California v. State of California, 677 F.2d 733 (9th Cir. 1982), petition for cert. filed, No. 82-262 (August 14, 1982); Norris v. Arizona Governing Committee for Tax Deferred Annuity, 671 F.2d 330 (9th Cir. 1982), petition for cert. granted, No. 82-52 (October 12, 1982); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 27 FEP Cases 1306 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 FEP Cases 527 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. I.A.M., 24 FEP Cases 995 (C.D. Cal. 1980); see Sobel v. Yeshiva University, 477 F. Supp. 1161 (S.D.N.Y. 1979); see also Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976); Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973), on remand, 11 FEP Cases 330 (D.N.J. 1974), aff'd without opinion, 527 F.2d 645 (3rd Cir. 1976); Henderson v. State of Oregon, 405 F. Supp. 1271 (D. Ore. 1975); Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), rev'd on other grounds, 519 F.2d 559 (2d Cir. 1975) (failure to award attorney's fees), aff'd in part, rev'd in part on other grounds, 427 U.S. 445 (1976) (failure to award back pay).

longer than men as a class. At the least, this holding reveals a fundamental misunderstanding of Manhart's clear dictate that "individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII." Id. at 710. Manhart held that a differential based on the greater average longevity of women is not a "factor other than sex;" rather, the differential represents "treatment of a person in a manner which but for that person's sex would be different." Id. at 711. This Court also emphasized that evidence of the actuarial equality of benefits paid to women as a group "does not defeat the claim that the practice, on its face, discriminated against every individual woman." Id. at 716. Although Title VII does not make it unlawful to determine the funding requirements for an employer's benefit plan by considering

the composition of its entire work force,[24/] payments made to employees must be equal.

### B. The Court Below Erroneously Applied This Court's Allocation Of Evidentiary Burdens Outlined In Burdine To A Title VII Case In Which There Was No Factual Dispute That The Employment Practice At Issue Concededly Utilized A Sex-Based Classification

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court set forth, for individual Title VII disparate treatment cases, an analysis "intended progressively to sharpen the inquiry into the elusive

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24/ See Manhart, 435 U.S. at 718 ("Nor does [our holding] call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.").

factual question of intentional discrimination." Id. at 254, n. 8. The endpoint of the analysis is the determination whether the plaintiff has succeeded in the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated." Id. at 253. In the instant case, however, the fact that the retirement plan at issue utilizes a sex-based classification to compute individual employee pension benefits was never disputed, and is unmistakably clear from the face of the policy itself. Thus, the end point contemplated by the McDonnell Douglas and Burdine analysis constituted the beginning of the analysis in this case, and those decisions accordingly offer no guidance with regard to the critical issue here -- whether explicit, admittedly purposeful discrimination in the pro-

vision of retirement benefits is unlawful under this Court's reasoning in Manhart.

Nevertheless, the Court below applied Burdine and held that 1) the greater average longevity of women constitutes a "legitimate non-discriminatory reason" for use of sex-based mortality tables, and 2) plaintiffs failed to demonstrate that reliance on the greater longevity of women was a pretext to "disadvantage and harm" women. In so doing, the Court of Appeals seriously misapprehended this Court's decision in Burdine, and transformed an analysis which was intended to be a fact-finding mechanism into an erroneous legal definition of intentional discrimination under Title VII. See generally, Pullman-Standard v. Swint, ___ U.S. ___, 72 L.Ed. 2d 66, 102 S.Ct. 1781 (1982).

The McDonnell Douglas and Burdine analysis is applicable where plaintiffs, in order to establish a prima facie case, rely on circumstantial evidence supporting the inference of discrimination.[25/]

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25/ As other courts of appeals have recognized, that analysis is not apt where the plaintiff "relies chiefly upon direct evidence of discriminatory motive." Loeb v. Textron, Inc., 600 F.2d 1003, 1018 (1st Cir. 1979) (age discrimination case). See, e.g., Lee v. Russell County Bd. of Education, 684 F.2d 769, 773-774 (11th Cir. 1982) (§1983 race discrimination case); Muntin v. State of California Parks and Recreation Dept., 671 F.2d 360, 361-362 (9th Cir. 1982) (Title VII sex discrimination case); Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980) (§§1983 and 1981 alienage discrimination case); see also Evans v. Harnett County Board of Education, 684 F.2d 304, 307 (4th Cir. 1982) (Title VII race discrimination case).

As explained in Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." In Burdine and McDonnell Douglas, the employers denied any intent to treat employees differently on the basis of race or sex. The factual inquiry therefore focussed on whether the stated reason for the employers' actions were the true reason or whether they were pretexts for intentional discrimination. Applying the careful division of intermediate evidentiary burdens outlined in Burdine serves no purpose, however, when the employer's policy is based on an explicit sex-based classification.

An employment policy which explicitly treats employees differently because of their race or sex by definition constitutes intentional discrimination. Los Angeles Department of Water and Power v. Manhart, 435 U.S. at 711; Dothard v. Rawlinson, 433 U.S. 321, 332-33 (1977); see also Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). When an employer has adopted an explicit sex-based classification, intent to discriminate, i.e., to treat differently, is apparent from the employer's mere action in classifying its employees on

the basis of sex.[26/] The Court of Appeals below apparently assumed, wrongly, that intentional discrimination could only be established under Title VII if the employer used sex-based actuarial tables in order to "harm or disadvantage" women. The decision below accordingly conflicts with decisions of this Court, decisions

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26/ One commentator has explained the distinction as follows:

> Both facial [overt] discrimination and pretext cases are often referred to as 'discriminatory treatment' cases and require proof of intent to discriminate . . . . In facial discrimination cases, the existence of the requisite intent is apparent from the employer's act of classifying employees on a prohibited basis.

Williams, Wendy, W., Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII, 69 Geo. L.J. 641, 669 and n. 176 (1981).

of other federal courts of appeals,[27] and with basic legal principles inherent in Title VII and constitutional analysis.[28]

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27/ E.g., Spirt v. TIAA-CREF, supra; Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), petition for cert. granted, No. 82-52 (October 12, 1982); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978).

28/ Although the same standard of intent to discriminate required to be met in constitutional challenges is, of course, not always imposed in Title VII cases, an explicit gender-based classification itself establishes the requisite discriminatory purpose in cases brought under the Equal Protection clause. As explained by Justice Stewart in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272-73 (1979),

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. . . . Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.

(footnote continued on following page)

It is axiomatic that explicit sex-based classifications constitute intentional discrimination, regardless of the fact that the classification was not primarily designed to injure or disadvantage women. Unlike race discrimination, invidious discrimination against women has historically been characterized by benign motives, yet that fact has not altered its essential character or mediated its harmful effects.[29/]

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Intentional discrimination is present even if the asserted purpose of the classification is "'to favor [women], not to disfavor them.'" Wengler v. Druggists Mutual Ins. Co. 446 U.S. 142,150 (1980). See also Orr v. Orr, 440 U.S. 268 (1979) (alimony statute which benefitted only women invalidated as unconstitutional intentional discrimination).

29/ For example, state protective laws, designed specifically to "benefit" women by protecting them from arduous and dangerous work -- sometimes also highly remunerative and otherwise desirable -- constitute intentional discrimination under Title VII. See, e.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

Having proved the ultimate question at issue in the Burdine analysis simply by proving the existence of a sex-based classification, it is apparent that the analysis serves no further purpose in the instant case. Any justification which might be advanced for the practice cannot detract from the conclusion that, "but for" their sex, individual women would suffer no disabilities from the operation of the retirement plan.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit. Petitioners respectfully suggest that summary reversal would be appropriate for that portion of the judgment and opinion which

directly conflicts with this Court's decisions. For that portion of the judgment raising important statutory issues not yet settled by this Court, and on which there is a conflict in the circuits, petitioners urge the Court to hear this case on an expedited schedule in tandem with Arizona Governing Committee v. Norris, No. 82-52.

Respectfully submitted,

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Dated:
November 9, 1982

Nos. 79-1658, 79-1670, 79-1671

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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MILDRED PETERS, et al.,

*Plaintiff-Appellees,*

v.

WAYNE STATE UNIVERSITY (79-1670), TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND (79-1658, 79-1671),

*Defendants-Appellants.*

ON APPEAL from the United States District Court for the Eastern District of Michigan.

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Decided and Filed October 14, 1982

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Before: MARTIN, Circuit Judge; PHILLIPS and BROWN*, Senior Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. This case requires us to decide whether Title VII prohibits an insurance company from operating or an employer from selecting a retirement benefits plan under which the size of monthly annuity payments is calculated from sex-segregated mortality tables. Wayne State University offers its faculty and certain other employees an annuity pension plan administered by Teacher Insurance and Annuity Association and the College Retirement Equities Fund. Under this plan, female annuitants re-

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

ceive smaller monthly payments than similarly situated male annuitants. This distinction is based on the actuarial probability that women will live longer than their male counterparts.

The plaintiffs, female employees of Wayne State, brought this sex discrimination action in the District Court for the Eastern District of Michigan. The District Court found that both Teachers Annuity and Wayne State had violated section 703(a) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a). *Peters* v. *Wayne State University*, 476 F.Supp. 1343 (E.D. Mich. 1979). We disagree and reverse.

Wayne State is a state-supported university located in Detroit, Michigan. Teachers Annuity is a pair of companies designed specifically to serve the unique retirement needs of academic employees. Teachers Insurance and Annuity Association is a legal reserve life insurance company; College Retirement Equities Fund is a companion corporation organized to provide a greater variety of insurance services. Teachers Annuity enables employees of academic institutions to move from one institution to another because the employees take their personal retirement contracts with them as they move. Five hundred fifty thousand employees at over three thousand institutions contract directly with Teachers Annuity for retirement annuity benefits.

Wayne State does not require its employees to participate in the Teachers Annuity retirement plan. Employees who choose to do so contribute to the fund five percent of their salaries matched by a ten percent Wayne State contribution. Each contribution automatically purchases retirement benefits which vest immediately and irrevocably in the individual employee. At retirement, employees must select among several annuity payment options.

If a woman selects a "single life option," which provides monthly payments for life, she will receive smaller payments than a man of the same age and accumulated contributions. Teachers Annuity computes the annuities from standard

mortality tables which reflect the fact that, as groups, women live longer than men. At age sixty-five a woman's life expectancy is four years longer than a man's. To compensate for women's longevity, female annuitants receive smaller monthly payments. However, the present actuarial values of women's and men's benefits are identical.

The District Court found that both Teachers Annuity and Wayne State violated Title VII. Although women and men *as groups* received equal benefits, the District Court relied on *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), to find that the retirement plan discriminated against the *individual* female annuitant.

Section 703(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer*—
>
> > (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex. . . .

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Federal courts have construed the statutory language to include, as employers, employers' agents and those to whom employers have delegated responsibility for employee compensation. As the Supreme Court noted in *Manhart*, "[A]n employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer. . . ." 435 U.S. at 718, n.33.

In the present case, the District Court found that Teachers Annuity was an "employer" within the meaning of Title VII because "[t]he ties between WSU and TIAA/CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. The court emphasized the fact that Teachers Annuity's "sole reason" for

existence was to provide individually vested insurance contracts to employees of educational institutions.

The District Court's characterization of Teachers Annuity as an "employer" is clearly erroneous. Fed. R. Ap. P. 52(a). Obviously Teachers Annuity does not "employ" the plaintiffs in the conventional sense of the word. Neither does Wayne State retain Teachers Annuity as an agent or delegate to it any aspect of employee compensation. *See Los Angeles* v. *Manhart*. On the contrary, *Wayne State* determines the eligibility requirements for participation in the Teachers Annuity plans and sets the contribution levels for itself and its employees. Teachers Annuity's responsibility is limited to management of the retirement fund and disbursement of individual annuities. Furthermore, Wayne State exercises no control over Teachers Annuity, otherwise essential to a principal agent relationship. *NLRB* v. *Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F.2d 1335, 1366 (6th Cir. 1974). *See generaly* 2A C.J.S. Agency § 6; Restatement (Second) Agency § 14. Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity plan. Indeed, the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone. Wayne State has repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy.

Teachers Annuity is not an "employer" for the purposes of Title VII; Wayne State has selected Teachers Annuity's retirement planning services for its employees. Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

An insurance company is not bound by Title VII because

Clause, in *Geduldig*. The plaintiffs failed to demonstrate either disparate treatment or a disparate impact from the exclusion of pregnancy as a disability.

Like *Gilbert* and *Geduldig*, the present case concerns a benefit plan, not employee wages. In all three cases, the employers paid or required equal contributions for both women and men. Justice Rehnquist's analysis in *Gilbert* quoting *Geduldig* controls the present case:

> As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U.S., at 497 n 20.
>
> . . .
>
> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id., at 496-497. . . .
>
> As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*

429 U.S. at 138-139 (citations and footnotes omitted) (emphasis added). For the same reasons we hold that Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.

Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has

received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Gender neutral tables would not "equalize" the treatment of women and men. If annuities were calculated on gender neutral tables, women and men would receive equal payments. However, Wayne State would have to contribute more to a woman's retirement fund than to a man's. Consequently men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men.

The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas*, 411 U.S. at 806, *quoting Griggs*, 401 U.S. at 431. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Because our decision on the issue of Title VII liability disposes of the case, we need not address the other issues raised by the parties.

The decision of the District Court is reversed.

it furnishes its services to a Title VII employer. The reverse is not true. A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to discriminate against women. Wayne State emphasizes that Teachers Annuity's acts are lawful, that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees. Accordingly, Wayne State would be liable under Title VII if Teachers Annuity's plan discriminated against female annuitants. We hold, however, that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

"It is well established under Title VII that claims of employment discrimination . . . may arise in two different ways." *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either "disparate treatment" or "disparate impact." "The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others *because of* their . . . sex.'" *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977).

The District Court determined that Wayne State had violated Title VII without first finding either "disparate treatment" of women by Wayne State or a "disparate impact" on women of a Wayne State policy. Rather, the court relied *solely* on the holdings and dicta of *Manhart*. *Peters*, 476 F. Supp. at 1349. *See also Spirit* v. *TIAACREF*, Nos. 79-7715, 7737, and 7739, (2d Cir. decided Sept. 29, 1982); *EEOC* v. *Colby College*, 589 F.2d 1139 1st Cir. 1978). Careful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact. In short, there is no evidence that Wayne State treats women less favorably than men *because of* their sex.

Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting with the intent to discriminate. *Furnco Construction Co.* v. *Waters*, 438 U.S. at 579-580. *See also Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. *Id.* at 254, *citing Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate non-discriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.

Plaintiffs failed to carry their ultimate burden of persuasion

under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne State has not violated Title VII according to a disparate treatment analysis.

Neither has Wayne State violated Title VII according to a disparate impact analysis. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. "[P]ractices that are fair in form, but discriminatory in operation" produce a "disparate impact." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). *See also Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose. *Griggs*, 401 U.S. at 431.

Plaintiffs in this case claim that Wayne State's retirement plan has a disparate impact on women because women receive smaller monthly annuity payments than men. Plaintiffs focus on one fact, that the monthly checks received by women and men differ; they disregard all other aspects of the retirement plan. The District Court's focus and conclusion agreed with the plaintiffs': "[T]he use of separate mortality tables . . . is discriminatory as applied to an individual women annuitant." 476 F. Supp. at 1349. Both the District Court and the plaintiffs rely solely on *Los Angeles* v. *Manhart* for the proposition that "employer pension plans must be nondiscriminatory on an individual basis, rather than on class basis." *Id.*

In *Manhart* the Supreme Court invalidated Los Angeles' retirement programs because the city required women to contribute more than men to receive equal retirement benefits. The difference in contribution rates stemmed from standard mortality tables reflecting the fact that women as a group

live longer than men as a group. The city deducted the contributions directly from all employees' paychecks. The Court acknowledged the validity of the mortality tables but declared that Title VII protects *individuals*, not groups. The Court found the city liable for sex discrimination against each individual woman who received less take-home pay than a man for the same job.

Two significant factual differences exist between *Manhart* and the present case. In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

These factual differences are significant because the Supreme Court expressly limited its *Manhart* holding along these lines: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The Court's primary concern, that women received smaller paychecks for the same work, is not a factor in the present case.

Two landmark industrial benefits cases preceded *Manhart*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *reh. denied*, 429 U.S. 1079 (1977), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In both these cases the employer offered a disability benefits plan which excluded pregnancy as a disability. The Supreme Court found no sex discrimination under Title VII, in *Gilbert*, or under the Equal Protection

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILDRED PETERS, et al.,

Plaintiffs,

v. Civil No. 670165

WAYNE STATE UNIVERSITY, et al.,

Defendants.

_____/

OPINION

The plaintiffs, 78 past and present female Wayne State University employees, have alleged in their amended complaint that use of separate mortality tables for male and female annuitants by co-defendants Wayne State University (WSU), Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF) violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiffs

further allege that defendants conspired to deprive them of "the equal protection of Title VII by jointly agreeing to furnish a retirement program . . . which gives women participants lower monthly benefits than similarly situated men" in violation of 42 U.S.C. § 1985(3). Complaint ¶ 17. WSU filed a cross-claim seeking indemnification or contribution from TIAA/CREF for any money judgment plaintiffs may recover from WSU, alleging that TIAA/CREF unilaterally decided to use separate mortality tables for men and women.

In its answer to plaintiffs' amended complaint and the WSU cross-claim, TIAA/CREF denies that its retirement program discriminates against women and asserts that it is standard practice in the insurance industry to use separate mortality tables for men and women

and that their use in this case does not violate VII because all WSU employees "will for the same money, receive annuities of the same full present value, and each [employee] will have an equal actuarial opportunity ultimately to receive the same total benefits payments." Tr. 920, 1137, TIAA proposed f[i]nding #61.

On April 8, 1977 we certified the case as a class action, and on May 2, 1977, defined the class as:

> All past and present women employees of defendant Wayne State University who have participated or are participating in the TIAA/CREF retirement program provided by defendant Wayne State University to its employees.

This litigation has a long history. On January 9, 1976, while plaintiffs' charges of discrimination were pending before the Equal Employment Opportunity Commission (EEOC), the Board of Governors of WSU filed a complaint in this court

for declaratory and injunctive relief, naming as defendants the director and local officers of EEOC, WSU's collective bargaining units and various other federal officials.[1/] On January 27, 1976, plaintiffs filed their initial complaint against WSU, alleging that the retirement program WSU purchased from TIAA/CREF pays women participants in the program smaller monthly benefits than similarly situated male employees in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). Complaint ¶ 11. On December 14, 1976, we dismissed the action filed by the Board of Governors of WSU, concluding that its complaint failed to allege a case or controversy between WSU and the named defendants.

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1/ See Memorandum Opinion, Board of Governors of Wayne State University v. Perry, No. 670039 (E.D. Mich., December 14, 1976).

We pointed out that, in any event, "all of the issues raised by WSU [could be] asserted as defenses in the Peters action."

The facts relevant to a resolution of plaintiffs' Title VII claim were never really in dispute.[2/] The sole issue

2/ Defendants filed a motion for summary judgment but plaintiffs insisted that there were factual issues which had to be tried. To challenge defendants' use of separate mortality tables, plaintiffs promised they would produce statistical evidence to demonstrate that, although women as a group may live longer than men as a group, working women do not have greater longevity than working men. Plaintiffs did not, however, address this subject. Evidence produced by the defendants demonstrated that plaintiffs' suggestion was unfounded. Plaintiffs further contended that they would establish that more working women and working men have the same life span. At trial, plaintiffs produced "overlap" graphs which, in our view, are inconclusive. Finally, plaintiffs contended that they would demonstrate that defendants could use other non-discriminatory life expectancy predictors, such as health, weight, smoking, etc., in computing annuity rates. The evidence, however, demonstrated that only the immutable factors of age and sex could be used. See Order, September 21, 1977.

upon which the parties disagree is whether use by TIAA/CREF of sex-segregated life expectancy tables which results in smaller monthly annuity payments for women than similarly situated men violates Title VII. The circumstances leading to WSU's adoption of the TIAA/CREF retirement plan and the essential details of the retirement program itself are not disputed. Prior to July 1, 1958, before Wayne University became a state supported university, its employees were participants in the Detroit School Employees Retirement System (DSERS), a retirement program administered by the Detroit Board of Education. When WSU became a state sponsored university, it was required by statute to establish its own retirement program to provide benefits equivalent to those provided under the DSERS for those employees who did not

wish to remain in the DSERS. Before adopting a retirement program, the Wayne State Faculty Council established a "Retirement Advisory Committee," comprised of 14 faculty and administrative personnel, to conduct a comprehensive study and thereafter to recommend an acceptable retirement program.[3/] The Faculty Council's first report recommended that WSU adopt the TIAA/CREF retirement annuity program.[4/] Acting

3/ The Faculty Council appointed one of the named plaintiffs in this action and five WSU union representatives on the fourteen member Retirement Advisory Committee.

4/ The Wayne State Faculty Council considered five possible options: (a) continue with the DSERS; (b) join the Michigan Public School Employees Retirement Fund; (c) administer its own fund; (d) purchase a commercial life insurance plan; or (e) adopt the TIAA/CREF plan. The final report was comprehensive and included tables which illustrated the benefits available under the TIAA plan.

upon the Faculty Council's recommendation, the Board of Governors of Wayne State University passed a resolution adopting the TIAA/CREF retirement annuity program, effective July 1, 1958.

TIAA/CREF are corporations which provide insurance and retirement plans for faculty and staff employed by institutions of higher education. The TIAA is a non-profit legal reserve life insurance and annuity company organized under New York law. In 1916, the Carnegie Foundation for the Advancement of Teaching established the Commission on Insurance and Annuities, a highly regarded group of educators, which included representatives of the American Association of University Professors, the Association of American Universities, National Association of State Universities and the Association of American

Colleges, to conduct a comprehensive study of the need for pensions for individuals in higher education. They secured technical advice from the Actuarial Society of America and the American Institute of Actuaries. PX 22, at 5. After completing its work, the Commission thoroughly documented the need for a college retirement system and concluded that:

> A college retirement system should rest upon the cooperation and mutual contributions of the colleges and the teachers.
>
> For the assurance of the annuity, there must be set aside, year by year, enough to build up a reserve adequate to meet the ultimate benefit payments.
>
> The arrangement with the teacher should be put on a contractual basis.
>
> Inasmuch as the annuities were to originate with colleges that were ready to install retirement systems as a matter of institutional policy, the cost of the annuities could and ought to be reduced by eliminating the element of agents' commission from the premium schedule.

> The greatest freedom of movement of the college teacher from one college to another should be provided for. PX 22 at 5.

As a result of the Commission's study, the TIAA was incorporated ". . . as an educational service organization, [to provide] insurance annuities especially designed for employees of educational institutions in the United States and Canada." For many years, TIAA operated as if it were a subsidiary of the Carnegie Foundation "with its stock held and voted by the Carnegie Corporation as a trust for the college world . . . . " PX 22, at 6, PX 34, at 44. The annuity and insurance programs offered by TIAA were designed to fulfill the recommendations made by the Commission. Each annuitant had the security of an individual contract with TIAA which immediately vested and was fully funded. Tr. 100, 1103-09.

CREF, also a non-profit corporation, was created in 1952 by a special act of the New York legislature as a companion organization of TIAA to permit diversification of investments into common stocks. Tr. at 1112, PX 22 at 1, 8-9. TIAA now has annuity contracts with 550,000 employees in approximately 3100 educational institutions. Approximately 65,000 retired teachers and staff are currently receiving pensions. Tr. 1114-1115.

The WSU-TIAA/CREF "defined contribution" retirement plan is funded by both employer and employee contributions. WSU deducts 5% from the salaries of each employee and contributes 10% of each employee's salary, regardless of sex. Any full-time WSU employee 30 years of age with at least two years of service is eligible to

contract with TIAA/CREF for an annuity contract. There are some employees, however, who can enter the program at the time of hire, as a special condition of their employment agreement.[5/] Employee participation in the TIAA/CREF retirement program is voluntary. Each month WSU forwards to TIAA/CREF the contributions made by its employees together with its matching contribution. The contributions are then allocated and credited to individual accounts for each employee with whom

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5/ The terms of a retirement plan are a mandatory subject of collective bargaining under Michigan law. The collective bargaining agreements between WSU and its various employee unions define eligible groups of employees and set the amounts which the University must contribute on behalf of employees who select the TIAA/CREF plan. See WSU Exh. 118 at 22.

TIAA has a contract. Tr. 1110-17. The contracts, therefore, are fully vested so that each employee owns the rights to benefits accumulated during employment. Tr. 1129-30. The TIAA/CREF contract is fully "portable," so that the employee may take his/her contract to another institution if he/she leaves WSU. Tr. 1105-09. If the employee dies before retirement, his/her funds are available as a death benefit. If an annuity option is selected at death, or if the annuitant reaches retirement age, the available annuity options differentiate on the basis of sex in the amount of periodic benefits received by similarly situated men and women.

In addition to relying on standard mortality tables developed by the Society of Actuaries, TIAA/CREF's own actuaries

study annually the mortality experience of their own annuitants by comparing the number of annuitants alive at the start of each year with the number who have died during the year for each age and for men and women separately. These studies demonstrate a significantly higher mortality rates for men than for women.[6/] For example, studies involving TIAA annuitants from 1950-1975 disclosed that for every 100 female deaths there were 187 male deaths. Tr. at 935-44. TIAA's own mortality tables further show that, at every age, the male mortality rate is greater than the famale mortality rate. Tr. at 930-46. The data reflect that, at age 65, the

6/ In view of the large number of annuitants involved, we find these studies credible.

difference of life expectancy varies approximately four years. Tr. at 922, 1406. Thus, the mortality tables used by TIAA/CREF accurately reflect the actual experience of their own annuitants.

Although the plaintiffs have not disputed that the TIAA/CREF retirement plan operates on an actuarily sound basis, they nonetheless contend that paying retired women less monthly benefits than identically situated men discriminates against women in violation of Title VII.[7/]

7/ During the trial, the Court described plaintiff's position as follows:

> The Court: Ms. Ross, if Wayne State University negotiates or purchases a plan offered by an insurance company to provide annuity benefits for retirement and that company uses reasonable actuarial considerations taken into account by underwriters and one of those considerations is the mortality rate for women and men separately, are you contending that Wayne State University violates Title VII by so negotiating that contract or purchasing that plan?"
>
> Ms. Ross: That's right, your Honor." Tr. at 1181.

The plaintiffs argue that City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978), invalidated all sex-based differentials in employee group retirement plans, whether the plan is a defined benefit plan, as in Manhart, or a defined contribution plan, as in this case. Plaintiffs reason that in a retirement plan either the contributions are equal and the benefits varied or the benefits are equal and contributions varied to account for the lower female mortality rate. In either case, plaintiffs argue the greater longevity of women as a group is accounted for in one variable or the other and, therefore, the Court in Manhart did not intend to limit its holding to variables on the contribution end of a retirement plan.

From the beginning, defendants have contended that their plan, in which

equal contributions are made by and for all employees, does not violate Title VII or 42 U.S.C. § 1985(3) simply because, when computing periodic payment rates for annuities, they consider the different mortality risks of men and women. Defendants argue that even if the universally accepted practice of using sex-based mortality tables violates Title VII, their use would be permissible as being "reasonably necessary to the normal operation" of a sound retirement plan; that recognizing differences in male and female mortality is necessary to equitably administer the individual contracts with male and female annuitants; that Title VII, by its terms, applies solely to the relationship between employees and employer and not the contractual relationships between employees and insurers; and that Manhart is inapplicable since the Court clearly

held that neither its decision nor Title VII was meant to affect the insurance industry.[8/] In addition, TIAA/CREF justifies its use of sex-based tables by pointing out that although women receive smaller periodic benefits, their actuarial benefits are exactly the same.

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8/ Defendants also argue, as they did for summary judgment, that a Labor Department regulation, 29 C.F.R. § 800.116(d), allows either unequal contributions or unequal benefits in retirement plans. Although this regulation was not at issue in Manhart, the Court commented that the Wage and Hour Administration issued several conflicting regulations, § 800.116(d) and § 800.151 which prohibits sex-based wage differentials. After quoting § 800.151 approvingly, the Court concluded:

> [T]o, the extent that they conflict we find that the reasoning of § 800.151 has more "power to persuade" than the ipse dexit of § 800.116(d). Cf. Skidmore v. Swift & Co., 323 U.S. 134, 140.

We agree with the defendants that the defined contribution plan in this case provides equal actuarial benefits to both men and women, so that, on an actuarial basis, the plan does not discriminate against women. Mr. Ardan Gill[9/] explained in great detail the importance of risk classification in the

9/ Mr. Gill, whose testimony we fully credit, is an eminent authority in the field of actuarial science. He is a member of the Society of Actuaries and a past member of its Board of Governors. He served on the Society of Actuaries Mortality Committee which studies annually the mortality experience of a number of insurance companies and which periodically issues mortality tables. He also served on the Societies' Advisory Committee on Education and Examination. He has personally developed mortality tables and has written many insurance and annuity contracts. He has served as an underwriter in classifying risks. He was a senior vice-president and chief actuary for Mutual Life Insurance of New York, with actuarial responsibility for pensions. See, Biographical Information, TIAA Exhibit # 34, Tr. 898-908.

annuity and insurance business. Tr. at 908-921. He testified that age and sex are the only risk classifications recognized as significant in annuities. Age is significant because older groups have a lower life expectancy than younger groups, so it would be unfair to pay them an annuity at the same rate. Similarly, women as a group live longer than men and, therefore, the contributions accumulated in their individual account must be distributed over a greater period of time. He testified that no insurance company can ignore age or sex in risk classification. Tr. at 921.[10/] Mr. Gill explained that because women as a group live longer, use of separate life-expectancy tables for men and women is

10/ Mr. Gill disagreed with plaintiffs' expert, Mr. Anderson, who testified that sex was less important than age in risk classification. Tr. at 922.

necessary to correctly predict the number of monthly payments required for each group of annuitants. This will assure that the total payment to each retiree is "actuarily equivalent," though the periodic payments to women are less. Tr. at 953. Mr. Gill concluded that:

> [S]o long as you have the individual accounts which belong to the males and females, respectively, in my view there is no equitable way that you could equalize the income and give fair value for those accounts. Tr. at 985.

A plan which pays female annuitants at the same periodic rate as men, without additional funds, would become insolvent while a large number of female annuitants are still alive. See TIAA Exhibit #28 A-C.[11/] Plaintiffs' evidence did not

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11/ Dr. William Greenough, Chairman of TIAA/CREF, a recognized expert on retirement plans, agrees with Mr. Gill that given the same accumulation, a plan which pays female annuitants at the male rate cannot remain fiscally sound. Tr. at 1145-46.

refute that the TIAA/CREF plan does not discriminate against women on an actuarial basis.[12/] Thus, we find that the defendant's plan utilized proper actuarial considerations and men as a group and women as a group receive the same actuarial value for their money.

The plaintiffs have established without contradiction, however, that the TIAA/CREF program discriminates against individual women. There is no

12/ Plaintiffs called as a rebuttal witness Mr. Edwin Hustead, chief actuary for the Civil Service Commission. Although he testified that he believed that use of single sex mortality tables to structure annuity payments was feasible, he admitted that his was the minority view. Tr. 1346, 1357, 1410. It is apparent, however, that Mr. Hustead's opinion as to the appropriateness of "unisex" tables was based on his conception of public policy rather than his experience as an actuary. Tr. at 1406. Similarly, plaintiffs' finance expert, Dr. Gerald Martin, admitted on cross-examination that a female's account would have a greater present value if she received the same periodic payment as a male. Tr. at 238-39.

doubt that in a defined contribution plan an individual woman receives a smaller monthly check from TIAA/CREF than a similarly situated male, solely because she is a woman. It is obvious that all men and all women do not live to the age predicted for their sex by sex-segregated mortality tables. Consequently, assuming equal accumulations, every woman who dies at the same age as her male counterpart will receive less benefits both periodically and in total. Tr. at 38-41. Plaintiffs' actuarial expert testified that life expectancy is only a statistical average and that it is only in a group situation that one looks to the group as a whole to obtain an insurance rate. Tr. at

13/ 40, 57-58. Thus, the use of separate mortality tables is non-discriminatory as applied to men as a group and to women as a group, but is discriminatory as applied to an individual woman annuitant.

In City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978), the Court, after acknowledging that women as a class live longer than men as a class, held that to comply with Title VII, employer pension plans must be nondiscriminatory on an individual basis, rather than on a class basis. The Court reasoned that all individuals of a class do not share the characteristics of the class as a whole and that Title VII prohibits

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13/ Dr. Barbara Bergman, professor of economics, testified that individuals in annuity programs are placed into groups rather than into insurance risks, which does result in different treatment for those individuals. Plaintiffs, therefore, attempted to establish that many factors other than sex can predict mortality, such as health, blood pressure, obesity, environment, occupation, etc. Tr. 45-48, 1412-13.

treatment of individuals as a mere component of a class. The Court said:

> The statute makes it unlawful "to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. 43[5] U.S. at 708 (emphasis in original).

The application of Manhart to a defined contribution retirement plan requires that we resolve problems identical to those confronted by the First Circuit Court of Appeals in Equal Employment Opportunity Commission v. Colby College, 589 F. 2d 1139 (1st Cir. 1978). The defendants argue that Manhart is distinguishable because WSU makes equal contributions on behalf of all its employees regardless of sex, and because Manhart did not involve an insurance

company, separate from plaintiffs' employer.[14/] The First Circuit Court of Appeals rejected these same contentions in Equal Employment Opportunity Commission v. Colby College, supra, finding "the issues in this instant case highly comparable to Manhart." 589 F. 2d at 1144. It is apparent that the only difference between Manhart and this case is that Manhart involved a defined benefit plan rather than a defined contribution plan. We do not think this distinction is significant. In a retirement plan, either the contributions are varied to account for lower female mortality rate and the benefits are held constant, or the benefits are varied and the contributions are held constant. Thus, the rationale for a sex based differential

14/ See TIAA/CREF proposed conclusion of law, #3; WSU proposed finding of fact # 34, # 37.

is the same in either type of plan and the Court in Manhart nowhere limits its holding to defined benefit plans. We agree with the First Circuit that:

> If the statute's "focus on the individual" forbids an employer from treating women as a class with respect to annuities so as to require from them higher premiums, although they as a class receive more for their money, it is difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men, but receive smaller monthly payments.

The defendants TIAA-CREF rely upon the following language in Manhart:

> [W]e do not suggest that the statute (Title VII) was intended to revolutionize the insurance and pension industries. . . . Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. 435 U.S. at 717-18. (Footnote omitted.)

This language, however, is inapplicable because WSU employee are not provided

with an option to use their equal contributions at retirement to purchase the largest benefit they can on the open market.[15/] They can only purchase from TIAA/CREF, who utilize sex segregated mortality tables which discriminate against plaintiffs. We remain persuaded that Manhart's disapproval of the use of sex based longevity tables in a defined benefit plan extends to the defined contribution plan challenged here. We cannot accept WSU's argument that in making equal contributions they are acting independently of TIAA/CREF or TIAA's argument that they act solely as an insurer and not as an employer within the meaning of Title VII. The

15/ In 1972, TIAA/CREF offered annuitants only a 10% cash option at retirement, contingent upon the approval of the institution from which the employee retired. This cash option was not intended to permit the employee to purchase an outside annuity. It was intended to cover special transition needs. P. Exh. 29 at 1.

ties between WSU and TIAA/CREF are too great to allow them to each deny liability on account of the actions of the other. The sole reason for TIAA's existence is to service institutions of higher education and to do so by providing each employee with an individual contract which immediately vests and is totally portable.

In a post trial brief, TIAA/CREF suggests for the first time that we conclude as a matter of law that they are in the business of insurance, and, therefore, the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq (the "Act") exempts them from the provisions of Title VII. Defendants argue that as insurers they are controlled by state insurance laws "[which permit] insurers to recognize differing risks in male/female mortality in computing annuity rates under contracts such as those issued by the TIAA/CREF."

Defendants' proposed conclusions of law at 48. The Act was not considered by the Court in Manhart since an insurer was not involved. It was argued vigorously in Spirt v. Teachers Insurance and Annuity Association, 74 Civ. 1674 (S.D. N.Y.), however, in which the court held that TIAA is in the business of insurance, that its operations are fully regulated by New York Insurance Law, and that the Act, therefore, exempts it from the provisions of Title VII. The court further held that the Act did not apply to CREF because, as a variable annuity company, it does not assume any "investment risk" and thus is not in the business of insurance.

We cannot agree that TIAA's annuity business is the "business of insurance." We have already indicated that TIAA was incorporated as an educational service

organization to administer a retirement system exclusively for employees of educational institutions, a system dependent upon cooperation and mutual contributions from the colleges and teachers. To assure a sound retirement system, a reserve is accumulated which will meet ultimate benefit payments. Employees are furnished with individual contracts which provide for immediate vesting and which are fully funded. The cost of the annuity contract was reduced by eliminating agents and premium schedules. In many participating institutions, the contribution or rate of payment is a mandatory subject of collective bargaining by law. The annuitants are entitled to receive the full value of the funds in their accounts

through periodic payments or as a death benefit. Thus, as a service organization created to administer these annuity contracts, TIAA's relationship with its annuitants is not similar to the relationship existing between an insurance company and its policyholder. TIAA is so intertwined with the institutions it serves that it more resembles an employer rather than a company engaged in the "business of insurance." TIAA does not have an "investment risk" associated with the "business of insurance." The fact that TIAA uses sex-segregated mortality tables does not mean that it is "in the business of insurance" as defined in S.E.C. v. National Securities, Inc., 393 U.S. 453, 459-60 (1969). It means only that no subsidization is required

to equalize male and female periodic payments. Cf. Group Life & Health Insurance Co. v. Royal Drug Co., Inc., 47 U.S.L.W. 4203 (U.S. February 27, 1979) (primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk).

Thus, we conclude that as to their Title VII count, plaintiffs are entitled to a declaratory judgment that the defined contribution plan furnished WSU employees, like the defined benefit plan in Manhart, violates Title VII. Plaintiffs are entitled as well to an injunctive order enjoining TIAA and WSU from continuing with the TIAA retirement plan. We find that defendants did not intentionally discriminate against women, but rather believed that their plan, which did provide equal actuarial benefits for

both men and women, was in compliance with the laws.[16/] Under that finding, we conclude that retroactive damages should not be awarded. See Manhart, 435 U.S. at 718-23. This trial proceeded on the liability issue only and, thus, on the record before us, we are unable to determine whether any monetary award should be made against either or both defendants from the date Manhart was decided, April 25, 1978, to the present. We will, therefore, afford plaintiffs an opportunity to proceed with proofs on the damage issue,

16/ Various governmental agencies had conflicting views on the compliance issue. The Equal Employment Opportunity Coordinating Council which had statutory responsibility to reconcile conflicting agency views (42 U.S.C. §2000e-14) could not unanimously agree. See Memorandum Opinion, Board of Governors WSU v. Perry, No. 670039 (E.D. Mich., December 14, 1976), at 9, n.6.

limited to that period.[17/]

Finally, we find for defendants on plaintiffs' § 1985(3) count. In addition to failing to set forth in the complaint underlying factual allegations of a conspiracy, plaintiffs failed to produce credible evidence at trial of an "invidiously discriminatory animus" against women as a class. See Griffen v. Breckenridge, 403 U.S. 88 (1971). Plaintiffs must allege that there was a class based "invidiously discriminatory animus" behind the alleged discrimination. Moreover it was incumbent upon plaintiffs to prove that TIAA/CREF and WSU, motivated by an invidiously discriminatory animus, discriminated against them because they

17/ Since only declaratory and injunctive relief is being awarded, we need not decide the defendants' claims against each other. We leave that for consideration when we resolve the damage issue.

were women and not because they belong to a class of persons with greater longevity. See Ohio Inns, Inc. v. Nye, 542 F. 2d 673, 679 (6th Cir. 1976), cert. denied 430 U.S. 946 (1977). Plaintiffs neither alleged nor produced any such evidence. The evidence produced establishes only that TIAA/CREF, in considering sex as a risk factor, followed standard actuarial practice. Tr. at 922, 935, 1410-11.[18/] It is abundantly clear to us that plaintiffs' § 1985(3) claim must be dismissed.

Judgment will be entered accordingly.

IT IS SO ORDERED.

Robert E. DeMascio
United States District Judge

Dated: September 25, 1979

18/ See, Testimony of William Greenough, Chief Executive Officer of defendant TIAA/CREF, which we fully credit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILDRED PETERS, et al.,

Plaintiffs,

v. Civil No. 670165

WAYNE STATE UNIVERSITY, et al.,

Defendants.

_____/

JUDGMENT

This cause having come before the court for trial on the issue of liability, and the court having this date entered its Memorandum Opinion (Findings of Fact and Conclusions of Law);

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the plaintiffs have declaratory judgment that the Wayne State University Teachers Insurance and Annuity Association's Defined Contribution Retirement Plan violates Title VII of the Civil Rights Act of 1964;

IT IS FURTHER ORDERED AND ADJUDGED that defendants Wayne State University and Teachers Insurance and Annuity Association be and hereby are enjoined from further use of sex-segregated mortality tables in computing periodic payments;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' prayer for damages arising from the use of such tables prior to April 25, 1978 be and the same hereby is DENIED;

IT IS FURTHER ORDERED AND ADJUDGED that Count II of plaintiffs complaint alleging a cause of action pursuant to 42 U.S.C. § 1985(3) be and the same hereby is DISMISSED.

Robert E. DeMascio
United States District
Judge

Dated: September 25, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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MILDRED PETERS, et al.,

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WAYNE STATE UNIVERSITY, et al.,

Defendants.

_____/

ORDER

Defendants Teachers Insurance and Annuity Association and College Retirement Equities Fund having filed a motion for stay pending appeal or, in the alternative, for a limited stay to permit TIAA/CREF to obtain clarification of the judgment and to complete adoption and implementation of the changes in the Wayne State University Teachers Insurance and Annuity Association's Defined Con-

tribution Retirement Plan as mandated by the court; and defendant Wayne State University having filed a response, in which it joins in TIAA/CREF's request for a limited stay; and the plaintiffs having filed a response, in which they assert that TIAA/CREF's motion for a stay should be denied, except that the judgment should be clarified to correct the apparent clerical error in omitting CREF from the injunctive relief; and it appearing to the court that the judgment entered is clear and unequivocal and that the clarification requested by defendants TIAA/CREF and Wayne State University is anticipatory in that they raise questions as to consequences that may develop in the future, rather than raising questions as to the clarity of the language in the judgment; and it further appearing, however, that the

judgment should be amended to correct the clerical error made by the court in omitting CREF from the injunctive relief; and it further appearing that serious issues do prevail upon which there exists diverse opinion and that defendants are entitled to at least one appellate review before having to implement the adjustments required by the court in its judgment; and it further appearing, in any event, that immediate compliance with the court's judgment is not possible since adoption of a new rate table for existing contracts would require the approval of the New York Insurance Department and all annuitants must receive, as a contractual right, 90 days notice of the proposed rate change or, alternatively, since a new plan would be subject to collective bargaining at Wayne State University;

NOW, THEREFORE, IT IS ORDERED that defendants TIAA/CREF's motion for a stay pending appeal, pursuant to Rule 62(c), FED. R. CIV. P., of the court's judgment of September 25, 1979, be and the same hereby is GRANTED;

IT IS FURTHER ORDERED that defendants TIAA/CREF's motion for a limited stay to obtain clarification of the judgment and for a hearing on the motion for clarification of the judgment be and the same hereby is DENIED;

IT IS FURTHER ORDERED that the judgment be amended to provide that defendant CREF is enjoined from further use of sex-segregated mortality tables in computing period benefits.

Robert E. DeMascio
United States District Judge

Dated: October 26, 1979

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 79-1658, 79-1670,
79-1671

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MILDRED PETERS, et al.,

Plaintiffs-Appellees,

vs.

WAYNE STATE UNIVERSITY (79-1670),
TEACHERS INSURANCE AND ANNUITY
ASSOCIATION and COLLEGE RETIREMENT
EQUITIES FUND (79-1658, 79-1671),

Defendants-Appellants.

Before: MARTIN, Circuit Judge;
PHILLIPS and BROWN,
Senior Circuit Judges.

J U D G M E N T

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District

of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs taxed. Each party to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

Dated: October 14, 1982

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1375, 1376, 1377—August Term, 1981

(Argued June 18, 1982 Decided September 29, 1982)

Docket Nos. 79-7715, 79-7737, 79-7739

DIANA SPIRT,

*Plaintiff-Appellant-Cross-Appellee,*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

*Intervenors-Appellees,*

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

*Defendants-Cross-Appellants-Appellees.*

Before:

NEWMAN and PIERCE, *Circuit Judges,* and CANNELLA, *Senior District Judge.**

* The Honorable John M. Cannella, Senior United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, granting and denying motions and cross-motions for summary judgment and to dismiss. The court below found that defendants Teachers Insurance And Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by calculating retirement benefits based on sex-distinct mortality tables, and granted judgment against CREF, while finding that TIAA was exempt from the mandate of Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

Affirmed in part; reversed in part, and remanded.

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KENNETH D. WALLACE, New York, New York, for *Plaintiff-Appellant-Cross-Appellee.*

WILLIAM R. GLENDON, New York, New York (Rogers & Wells, New York, New York; James B. Weidner, James W. Paul, Joseph A. Post, of Counsel), *for Defendants-Cross-Appellants-Appellees Teachers Insurance And Annuity Association and College Retirement Equities Fund.*

JAMES KEARVEY, New York, New York (Webster & Sheffield, New York, New York; Donald J. Cohn, Miriam Lane Sparrow; Judith E. Tytel, General Counsel, Long Island University, of counsel) *for Defendant-Appellee-Cross-Appellant Long Island University.*

NEAL JOHNSTON, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York; Robert S. Hammer, Assistant Attorney General, of counsel), *for Appellee Albert B. Lewis.*

WILLIAM H. NG, Attorney, Washington, D.C. (Michael J. Connolly, General Counsel, Philip B. Sklover, Associate General Counsel, Vella M. Fink, Assistant General Counsel, of counsel), *for Intervenor-Appellee Equal Employment Opportunity Commission.*

JOHN L. POTTENGER, JR., New Haven, Connecticut (David M. Rabban, of counsel) *for Intervenor-Appellee American Association of University Professors.*

(Mary L. Heen, Isabelle Katz Pinzler, New York, New York, *for American Civil Liberties Union Women's Rights Project and New York Civil Liberties Union as* amici curiae.)

PIERCE, *Circuit Judge*:

It is plaintiff's claim, in this action which was filed in the United States District Court for the Southern District of New York more than eight years ago, that defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") have violated the equal employment provisions of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), by using sex-based mortality tables to calculate the benefits to which pension plan participants, including plaintiff, are entitled upon retirement. As a result of the use of such tables female retirees, who made contributions equal to those of similarly-situated males, receive a smaller monthly retirement benefit than do such male retirees. The district judge found that defendants' use of sex-based mortality tables violated Title VII, and granted summary judgment on this issue. He went on to hold, however, that TIAA—but not CREF—was exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Therefore, the district court enjoined CREF—but not TIAA—from using sex-based mortality tables to calculate the number of annuity units to which a retiree is entitled upon retirement on or after May 1, 1980, and enjoined Long Island University ("LIU"), plaintiff's employer, from either making contributions on behalf of its employees, or requiring its employees to contribute, to any retirement plan continuing to use sex-based mortality tables to calculate periodic benefits after June 1, 1980.

Plaintiff also claimed below that TIAA and CREF's methods of calculating retirement benefits violated the equal pay provisions of the Fair Labor Standards Act of 1964, 29 U.S.C. § 206(d), and infringed her right to equal protection of the laws in violation of 42 U.S.C. §§ 1983 and 1985. Finding no state action, the district judge granted defendants TIAA-CREF's motion for summary judgment on the §§ 1983 and 1985 claims. Plaintiff's equal pay claims apparently were not the subject of motions for summary judgment below, and were not dealt with by the district court.

Defendants TIAA-CREF and plaintiff have appealed virtually every final order of the district court pursuant to 28 U.S.C. § 1291.

We affirm in part and reverse in part.

I. *Facts*

Plaintiff Diana L. Spirt is a tenured professor at Long Island University. LIU has adopted a retirement program managed by TIAA and CREF for its tenured professors and certain other employees. Participation in this program is mandatory for most eligible employees, including plaintiff.

TIAA and CREF manage retirement plans for faculty and staff members at 85% of all private four-year colleges and universities and over 40% of all public colleges and universities in the United States. More than 400,000 employees at approximately 2800 colleges and universities participate in the TIAA-CREF system. TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. It is " 'an educational service organization [providing] insurance annuities especially designed for employees of educational institutions in the United States and Canada.' " *Peters v. Wayne State University*, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979).

In 1952, TIAA's companion organization, CREF, was created in order to allow the investment of pension funds in financial instruments other than those traditionally permissible for annuity funds like TIAA. It, like TIAA, is a non-profit corporation, created by special act of the New York State Legislature.

Under the LIU retirement plan the employee and the university each contributes 5% of the first $4800 of an

employee's yearly earnings to the pension fund. In addition, LIU contributes 11% of all earnings in excess of $4800, while the employee contributes 5% of all such earnings. Employees may also make voluntary additional payments into their pension fund accounts, on either a regular or an occasional basis. After receipt by TIAA-CREF, all contributions, plus minimum interest and dividends thereon, are immediately credited to individual employees' accounts as they accumulate. Pursuant to contract, all accumulated benefits are fully vested and fully "portable" at all times. Thus each employee has an immediate property interest in the benefits that accrue by virtue of the contributions made on the employee's behalf. In addition, each employee retains this ownership right if and when that employee moves on to other employment, either inside or outside the field of higher education. If a plan participant moves to another university that has adopted a TIAA-CREF retirement program for its employees, the new employer will pay its own pension contributions and those which it withholds from the employee's salary into the employee's existing account. If a plan participant obtains employment in a different field or at a teaching institution that does not use TIAA-CREF to provide its retirement program, that participant can nevertheless make additional contributions to the TIAA-CREF account on either a regular or occasional basis. Even if the employee fails to make such contributions, the participant will retain the right to receive, upon retirement, the benefits to which the participant is entitled by virtue of the contributions that were accumulated on his or her behalf. If a plan participant dies before retirement, the funds accumulated in the account are paid to a designated beneficiary as a death benefit.

After retirement, TIAA provides a life-long fixed dollar annuity, which pays the retired plan participant a specified and definite amount of benefit on a monthly basis.[1] CREF, on the other hand, provides its annuitants with a variable annuity. Under this plan the annuitant receives a periodic payment, the amount of which reflects the results of CREF's investment policies. Plan participants may allocate their contributions between TIAA and CREF in whatever proportions they choose, and under certain conditions, they may transfer contributions from one system to the other. Upon an employee's retirement, both the amount of the fixed benefit to be received monthly from TIAA and the amount of CREF units to be used in determining the amount of benefits to which an employee will be entitled each year under the CREF variable-annuity program are calculated, and the retiree's contract with TIAA-CREF is "settled."[2] This calculation of benefits is based in large part on life expectancy projections, which are determined, in turn, by use of sex-segregated mortality tables. Because women as a class live longer than men as a class, and women as a group are

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1 Although it is assumed that most TIAA-CREF participants will receive their retirement benefits on a monthly basis, an annuitant may choose to receive annuity payments quarterly, semi-annually, or annually, rather than monthly. JA 196. Also, rather than simply receiving benefit payments for the duration of one's own life (a single life annuity), a retiree can opt for a life annuity with a ten or twenty year guaranteed period, or for a joint-life option, under which benefits will continue throughout the lives of both the retiree and a named beneficiary. JA 383.

2 Under the TIAA-CREF system a retiree has no right to receive a lump sum payment for the full value of contributions paid into the fund. However, upon retirement a participant may choose to receive up to 10% of accumulated contributions for use in dealing with transitional costs. Receipt of such a payment results, of course, in a corresponding decrease in the amount of moneys available for annuity payments.

expected, as a result, to receive annuity payments over a longer period of time than similarly-situated men, the use of tables which reflect this male-female difference results in female retirees, who have made pension contributions that are equal to those made by similarly-situated men, receiving monthly payments that are smaller than those received by their male counterparts.[3] It is stipulated among the parties that "[c]ommencing at age 65, the amount of each periodic payment to male annuitants under the single life option is approximately 11.3% greater than the amou... ,ayable to female annuitants of the same age." JA 182. It is this result that is challenged as violative of Title VII.

II. *Procedural History*

Plaintiff initiated this action against TIAA and CREF by filing her complaint on April 15, 1974. On May 29, 1975, she moved for class certification and partial summary judgment. On August 20, 1975, defendants TIAA and CREF cross-moved for summary judgment and to dismiss the complaint pursuant to Rule 19, Fed.R.Civ.P., for failure to join the individual male annuitants in the TIAA-CREF system as indispensable parties to the litigation. On January 23, 1976, the motions for summary judgment were denied on the ground that there existed disputed issues of material fact. At that time decision on the other motions was postponed. On May 5, 1976, TIAA-CREF again moved for partial summary judgment on the ground that plaintiff had failed to properly file

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3 "Similarly-situated" individuals are those who are the same age, retire on the same date, and have identical amounts of accumulated contributions in their individual retirement accounts on the date of retirement.

with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights the complaints that are jurisdictional prerequisites to suit in the federal district court under Title VII.[4] In addition, defendants moved to dismiss for failure to join plaintiff's employer, LIU, as an indispensable party. In an opinion dated July 1, 1976, the district judge denied defendants' motion for partial summary judgment, denied plaintiff's motion for class certification, and denied defendants' Rule 19 motions except to the extent that plaintiff was directed to file an amended complaint joining LIU as a defendant in the action. After filing an amended complaint, plaintiff moved once again for summary judgment. Defendants TIAA and CREF again cross-moved for summary judgment. In their motions both parties relied heavily on a Stipulation of Facts dated April 21, 1977. On August 9, 1979, Judge Ward filed an opinion in which he found that TIAA-CREF's use of sex-based mortality tables violated Title VII of the Civil Rights Act of 1964. Therefore, the district judge granted summary judgment in plaintiff's favor against CREF and enjoined CREF from using sex-based mortality tables in calculating benefits to which retirees would become entitled upon retirement on and after May 1, 1980. However, because the district judge also found that TIAA was in the business of insurance, he granted summary judgment in favor of TIAA on the ground that it was exempted from the provisions of Title VII by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

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[4] We agree with the district judge that neither plaintiff's failure to file a complaint with the EEOC prior to initiating her suit in the district court, nor her alleged failure to pursue her state remedies, served to defeat the jurisdiction of the district court over this action. *See Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754-55 (2d Cir. 1976).

Although the district judge entered no order directly against TIAA, he did enter an order enjoining LIU from making any contributions, and from requiring its employees to contribute, to any retirement plan that continued to use sex-distinct mortality tables in calculating the periodic benefits to be received by persons retiring on or after June 1, 1980.[5] CREF moved for reargument, contending that the relief granted was improperly retroactive since it would alter the value of benefits that men would receive as a result of contributions made to CREF prior to the date of the district court's decision. This motion was denied on September 12, 1979. In October, 1979, defendants TIAA, CREF, and LIU, and plaintiff Spirt all filed Notices of Appeal from the judgment of the district court. However, these appeals were withdrawn from the active consideration of this Court on January 8, 1980, so that the district judge could supervise the settlement negotiations then proceeding between the parties. During this period, TIAA and CREF made several attempts to design and obtain approval for merged-gender, or "unisex" mortality tables for the calculation of annuity benefits attributable to contributions made after the proposal's adoption.[6] The first of these plans ("Unisex I")

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[5] This order obviously meant that LIU could no longer deal with TIAA unless TIAA "voluntarily" began to use gender-neutral mortality tables to calculate the benefits to be received by a retiring plan participant. It was also always clear that TIAA and CREF are so closely intertwined that, as a practical matter, TIAA would have to make changes in its method of calculating accrued benefits in order to synchronize with any changes made by CREF. Indeed, at a hearing after remand, Judge Ward stated, "I have always visualized TIAA and CREF somewhat like twins and I sort of separated the Siamese twins but I recognize that though I may have separated them in one way from a practical and business point of view they must follow the same course." JA 683.

[6] Apparently no attempt was ever made to design unisex tables for use in calculating benefits based on contributions accumulated prior to the

was disapproved by the EEOC. After modification, the plan ("Unisex II") was resubmitted and was approved by the EEOC, but was then disapproved by the New York State Superintendent of Insurance, Albert Lewis, in January and February, 1981.[7]

By February 19, 1981, settlement negotiations had collapsed, and this Court granted a limited remand of the case to allow consideration of TIAA-CREF's "good faith reliance" defense against the imposition of what they, and, apparently, Superintendent Lewis, considered to be retroactive relief, and to permit the plaintiff to join Superintendent Lewis as a party. Plaintiff then filed a supplemental complaint and a motion for summary judgment. TIAA-CREF cross-moved to dismiss the supplemental complaint for failure to state a claim upon which relief could be granted. In an opinion dated March 19, 1982, the district judge rejected TIAA-CREF's good faith reliance defense, denied plaintiff's motion for summary judgment against Superintendent Lewis, granted defendants' cross-motion to dismiss the supplemental complaint, and granted motions by the EEOC and the American Association of University Professors ("AAUP") to intervene with regard to the issue of "good faith reliance." On March 29, 1982, the district court granted a stay pending appeal of its orders. TIAA-CREF and plaintiff filed Amended Notices of Appeal on April 7, and

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date of the district court's order, although such tables would have been required if the parties were to comply fully with that order.

7 The disapproval of "Unisex II" was based on the Superintendent's view that the change would unfairly deprive male participants of the full value of contributions made while TIAA-CREF was using sex-based mortality tables. JA 621. Superintendent Lewis did approve a later merged-gender proposal ("Unisex III"), but Unisex III was disapproved by the EEOC, which viewed it as violative of Title VII and the Equal Pay Act.

April 12, 1982, respectively. Virtually all of the issues decided by the district judge are now before us on appeal.

III. *Title VII Violation*

Title VII of the Civil Rights Act of 1964 was enacted in order to deal with the essential unfairness of employment discrimination. Members of Congress saw its provisions as a necessary element of the comprehensive anti-discrimination legislation of which it was a part because "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2355, 2516. Title VII provides that

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any invididual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

In *City of Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 712 n.23 (1978), the Supreme Court stated that pension benefits are "compensation" under Title VII, and held that Title VII was violated by an employer-run pension plan that paid all similarly-situated employees equal retirement benefits, but required its female employees, while working, to make larger contributions to the pension fund than its male employees were required to make. In *Manhart* the Court acknowledged that "[a]s a class women live longer than men," 435 U.S.

at 704, and that the differential treatment received by individual women was based upon actuarially-sound projections as to the total amount of benefits likely to be received by women as a class. The Court pointed out, however, that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708. In addition, the Court found that, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* Because there is no way of knowing prior to or at the time of retirement, which *individual* female retirees will fulfill actuarial predictions as to longevity and in fact live longer than the average male retiree, a requirement that *all* female employees make larger contributions than *all* male employees penalizes all female retirees who do *not* actually live longer than the average male retiree. Such a result, the Supreme Court held, violates Title VII because it does not "pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Id.* at 711 (footnote omitted).

Like the district judge, we can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart,* who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment accorded the female TIAA-CREF participants in this case. Although female TIAA-CREF participants make contributions to their retirement accounts that are equal in amount to those made by their male counterparts, they are paid a smaller

monthly benefit upon retirement simply because they are women. Every federal court that has considered the issue has found that no legally significant difference exists between unequal contributions for equal payments and equal contributions for unequal payments. *See, e.g., Retired Public Employees' Association of California v. California,* 677 F.2d 733, 735 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity,* 671 F.2d 330, 334 (9th Cir. 1982), *cert. pet. filed,* Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College,* 589 F.2d 1139, 1144 (1st Cir. 1978); *Women in City Government United v. City of New York,* 515 F. Supp. 295, 298 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System,* 26 FEP Cases 527, 530 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.,* 476 F. Supp. 1343, 1350 (E.D. Mich. 1979). In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII. Each female TIAA-CREF plan participant is maintained at a lower economic level than her male counterparts for as long or short a time as she is alive to receive benefits, regardless of whether she is ultimately one of the few who outlives the average male participant or is one of the 84% of all women who do not outlive their male counterparts. *See Norris v. Arizona Governing Committee, supra,* 671 F.2d at 332 n.1.

The period of time over which the female TIAA-CREF participant will receive the lower benefits awarded her under the present plans is both indefinite and unknowable at the time of retirement. In addition, this lesser benefit will be received at a time when most often the recipient must live on a fixed income, and is unable to increase her benefits as she might increase her salary by working for a

promotion during her working years. It is also received at a time—in her older years—when the amount of dollars available to her is apt to crucially affect her ability to meet her basic needs. It was largely because of its concern with this dependence on pension benefits in workers' retirement years that Congress enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), in 1974. The House Committee stated in this regard that ERISA's "most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings in our society." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4646.

Defendants attempt to argue that the TIAA-CREF plans are fair to both men and women because each individual participant receives a benefit package that is of actuarially equal value. This argument is unconvincing because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarily equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups.

In the time elapsed since its decision in *Manhart* the Supreme Court has not modified in any way its focus on "fairness to individuals rather than fairness to classes," 435 U.S. at 709, in Title VII cases. To the contrary, in *Connecticut v. Teal,* 50 U.S.L.W. 4716 (U.S. June 21, 1982), the Supreme Court held that where a promotional examination had a racially disparate impact on blacks,

the employer could not defend the use of the exam on the ground that a higher than average percentage of the blacks who did pass the test were in fact promoted, with the result that the "bottom line" impact was not only nondiscriminatory, but was actually more favorable to blacks as a group than to whites. In reaching its decision the Court stated that "[i]t is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employee's group." 50 U.S.L.W. at 4720.

We also reject defendants' claim that it would be unfair to equalize the monthly benefits to be received by male and female annuitants because men, as a class, will then receive less total benefits than will women as a class. First, this argument loses sight of the need to focus on impact on individuals as opposed to impact on a class. Further, under an equal benefit system each individual male annuitant will be treated in exactly the same way as each of his female counterparts. Under such a system, an individual male annuitant will be disadvantaged only as compared to his male counterparts who have in the past received larger benefits as a result of TIAA-CREF's sex-based discrimination in their favor. Male participants in TIAA-CREF are not being treated unequally when the risk that each and every annuitant, male and female, will live longer than the average is spread across the entire covered population rather than being imposed on one sub-group within that total population. The fact that such equal spreading of risk may have the result that, from a statistical point of view, men as a *class* subsidize somewhat the benefits received by women as a *class* is irrelevant in the context of a statute that seeks fairness to *individuals*, and is not, in any event, contrary to the

continuing intent of Congress, as such intent was evidenced in 1978, when it amended Title VII to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

In *Gilbert* the Supreme Court held that an employer's disability benefits plan that failed to provide coverage for pregnancy-related disabilities did not discriminate against women in violation of Title VII. Congress quickly responded to this decision by adding 42 U.S.C. § 2000e(k) to Title VII. That section provided that

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Congress was aware that this amendment would increase the cost of work-related disability and health insurance plans, *see* H.R. Rep. No. 948, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4757-58, and specifically understood and intended that in the case of contributory programs the amendment would require that *all* employees—not just women—would be assessed their proportionate portion of the incremental cost. *Id.*, [1978] U.S. Code Cong. & Ad. News at 4756.

We find, therefore, that TIAA-CREF's use of sex-distinct mortality tables constitutes unequal treatment based solely on an individual's sex. In order for this practice to

violate Title VII, however, the unequal treatment must be practiced by an "employer." It is clear that plaintiff's contract for retirement benefits is not with LIU, but with TIAA-CREF, an independent insurer. Plaintiff clearly is not an employee of TIAA-CREF in any commonly understood sense. However, it is generally recognized that "the term 'employer,' as it is used in Title VII is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *Vanguard Justice Society, Inc. v. Hughes,* 471 F. Supp. 670, 696 (D. Md. 1979). *See also Baker v. Stuart Broadcasting Co.,* 560 F.2d 389, 391 (8th Cir. 1977); *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973); *EEOC v. Wooster Brush Co.,* 523 F. Supp. 1256, 1261-62 (N.D. Ohio 1981); *Puntolillo v. New Hampshire Racing Commission,* 375 F. Supp. 1089 (D.N.H. 1974).

We agree with the district judge that TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, (in this case LIU), that they must be deemed an "employer" for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF.

In addition, the language of the Supreme Court in *Manhart* would seem to compel a finding that delegation of responsibility for employee benefits cannot insulate a discriminatory plan from attack under Title VII. The

Court stated therein that it did not wish to "suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718 n.33. Finally our conclusion here is in accord with that of a number of other courts. These courts have recognized that exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII, and have held *Manhart* applicable to pension plans run by third-party insurers. *See Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978) (holding TIAA-CREF subject to Title VII); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1266 (N.D. Ohio 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1350 (E.D. Mich. 1979) (holding TIAA-CREF subject to Title VII).

IV. *Impact of the McCarran-Ferguson Act*

Having determined that the TIAA-CREF benefit systems discriminate against women in violation of Title VII, we must determine whether there is any countervailing federal law or policy which renders Title VII inapplicable to TIAA and/or CREF. TIAA and CREF contend that because they are engaged in the business of insurance they are exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* ("the McCarran Act").

The McCarran Act provides, in pertinent part, that

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for

> the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

The McCarran Act will exempt defendants TIAA and/or CREF from conforming their operations to the mandates of Title VII only if (1) defendants are engaged in the business of insurance; (2) Title VII does not specifically relate to the business of insurance; and (3) Title VII, as construed, invalidates, impairs, or supersedes a state law enacted to regulate the business of insurance. The district judge looked to each of these criteria and concluded that the McCarran Act exempted TIAA, but not CREF, from the requirements of Title VII. We find that the McCarran Act exempts neither TIAA nor CREF from such compliance, and reverse the ruling below as to TIAA.

Judge Ward found that the McCarran Act did not exempt CREF from compliance with Title VII because CREF was not in the business of insurance. We agree. CREF is a variable annuity company.[8] As such it does not commit itself to pay a pre-determined amount of benefit each month. How much it actually does pay is determined periodically, and directly reflects the results of the fund's investment policies. Thus, a variable annuity company is not subject to the risk that its obligations will exceed its return on investments.

As the Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 71 (1959), variable annuity plans like CREF have a number of the characteristics of insur-

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[8] The Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 69 (1959), that CREF was the first variable annuity company in the United States.

ance. The variable annuity company pays its annuitant on a periodic basis, and continues to do so until the death of the annuitant, or for a fixed period; payments are made from both income and principal; and the amount of benefit each annuitant receives is calculated on the basis of traditional actuarial principles which take into account, *inter alia*, age and sex. Finally, the issuer assumes the risk of mortality—that is, that the annuitant will live longer than predicted on an actuarial basis. Nevertheless, the *Variable Annuity* Court found that "absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing." *Id.* (footnote omitted). The Court then went on to hold that since the "concept of 'insurance' involves some investment risk-taking on the part of the company," the issuer of variable annuity contracts is not engaged in the business of insurance and is not protected from federal regulation by virtue of the McCarran Act. *Id. See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-12 (1979). Therefore, the district judge was correct in holding that CREF is not in the business of insurance and is required to comply with the mandate of Title VII.

On the other hand, TIAA commits itself, at the time a plan participant retires, to pay the retiree a specific, fixed amount of money each month. As a result, TIAA is subject to investment risk. Since its contracts, like those issued by CREF, have the other characteristics of insurance contracts, we will assume, as TIAA contends and as the district judge found, that TIAA is in the business of insurance. Our next step, then, is to determine whether Title VII specifically relates to the business of insurance.

If not, we must then determine whether a holding that TIAA must pay equal monthly benefits to all of its annuitants would be a holding in which we construed an Act of Congress so as to invalidate, impair, or supersede a state law enacted to regulate the business of insurance in violation of the McCarran Act.

The McCarran Act was enacted in 1945 in direct reaction to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944), one year before. In *South-Eastern Underwriters* the Court held that insurance companies involved in insurance transactions across state lines were engaged in interstate commerce and subject to federal regulation under the Commerce Clause. Therefore, the Court found, the price-fixing activities of such insurance companies were subject to attack under the Sherman Antitrust Act. This holding created the fear that traditional forms of state regulation and taxation of insurance companies doing business within the state could be invalidated on Commerce Clause grounds, and that the insurance industry would be thrown into chaos as a result. Thus, Congress' purpose in adopting the McCarran Act was only to ensure that the states would be permitted to fulfill their traditional role in relation to insurance regulation. As stated by the Supreme Court, the intent was, first, "to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack," *Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 440 U.S. 205, 218 n.18, and, second, to give insurance companies only a limited exemption from the antitrust laws. *Id. See also SEC v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969) ("Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax

insurance companies."). According to the legislative history, it was "not the intention of Congress to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision . . . in the *South-Eastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., *reprinted in* [1945] U.S. Code Cong. Svce. 670, 671 (Feb. 13, 1945).

We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance." *Accord, EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1265 (N.D. Ohio 1981); *Women in City Government United v. City of New York*, 515 F. Supp. 295, 302-03 (S.D.N.Y. 1981).

The view that the McCarran Act does not render Title VII inapplicable to an employment-related pension plan finds further support in the Congressional debates surrounding the enactment of ERISA (a statute which clearly "specifically relates to the business of insurance") in 1974. It is clear from those debates that the members of Congress believed that Title VII did specifically prohibit racial and sex-based discrimination in pension benefit programs. As summarized by the Seventh Circuit:

> Senator Mondale and Representative Abzug sought to include in ERISA provisions prohibiting discrimination in the administration of welfare benefit plans. Senator Williams assured Senator Mondale

> that such an amendment would be unnecessary and might undermine federal antidiscrimination efforts, stating: 'I believe that . . . centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunities Commission under terms of existing law.' 119 Cong. Rec. 30409 (1973). Representative Dent reiterated in the House that discrimination could best be prohibited 'under terms of existing law.' 120 Cong. Rec. 4726 (1974). On this basis, ERISA was not amended to prohibit discrimination.

*Bucyrus-Erie Co. v. Dept. of Industry, Labor & Human Relations*, 599 F.2d 205, 211-12 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). *See also Women in City Government United v. City of New York*, 515 F. Supp. 295, 304-05 (S.D.N.Y. 1981).

Furthermore, in this case Title VII is not being *construed* to *implicitly* pre-empt state laws. Title VII contains a broad and explicit pre-emptive provision. *See* 42 U.S.C. § 2000e-7. That section provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

To the extent that New York law either permits, or seeks to enforce the use, or continued use, of gender-based mortality tables in violation of Title VII, it is clearly pre-empted under § 2000e-7. The McCarran Act was

never meant to prevent, and could not prevent, Congress from explicitly imposing requirements on employers and their agents under the civil rights statutes, the National Labor Relations Act, or any other statute that seeks to enforce compliance with federal policies in such fields as civil rights, labor and other areas of national concern.

We hold, therefore, that Title VII explicitly pre-empts New York insurance laws to the extent that they "require or permit" a method of calculating pension benefits that we have found to be "an unlawful employment practice" under Title VII. Therefore, the McCarran Act does not exempt TIAA from complying with the dictates of Title VII. Having so held, we need not reach the question whether application of Title VII will invalidate, impair, or supersede New York State insurance law.[9]

It is to be noted, however, that although the State Superintendent of Insurance has approved two sets of proposed unisex mortality tables for calculation of benefits based on contributions made after the date the new plans are approved, he has indicated that he will not approve such tables for use in calculating benefits based on contributions made prior to the effective date of the new plans. Obviously, our holding that Title VII pre-empts state insurance law with which it conflicts dictates that where the relief ordered necessarily has an impact on contributions paid to TIAA and CREF prior to the effective date of our order, the New York State Superintendent of Insurance will be precluded from disapproving plans designed to conform with the order.[10]

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9 In light of our holding that Title VII applies to both TIAA and CREF and that it has been violated by their sex-based method of calculating retirement benefits, we need not reach the secondary issues raised on appeal.

10 We note that the Superintendent has indicated that he will, of course, comply with a final order of this Court.

V. *Relief*

Judge Ward enjoined CREF from using sex-based mortality tables to calculate the number of annuity units to which plan participants are entitled upon their retirement on or after May 1, 1980. He also enjoined LIU from making contributions on behalf of its employees, and/or from requiring its employees to contribute to any retirement plan that continued to use sex-based mortality tables after June 1, 1980. In reviewing an award of relief we must determine whether the judge below abused his discretion "to locate a 'just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 424-25 (1975) (quoting *Langnes v. Green,* 282 U.S. 531, 541 (1931)).

In light of our holding that TIAA is subject, as is CREF, to the mandate of Title VII, any relief awarded to plaintiff will apply equally against both.

The order enjoining LIU from making contributions to any pension fund making use of sex-based mortality tables to calculate benefits accruing as a result of contributions made after June 1, 1980, logically follows from the holding that the use of such tables constitutes discrimination on the basis of sex in violation of Title VII, and must be affirmed. It is also clear that the part of Judge Ward's order requiring CREF to use gender-neutral mortality tables to calculate benefits that result from contributions made after the effective date of the order, May 1, 1980, must be affirmed, and extended to include TIAA. Defendants have already attempted to revise their practices to conform to the above. However, they have not presented for approval gender-neutral tables for the calculation of benefits based on contributions made prior to May 1, 1980, but first payable upon a plan participant's retirement after that date. Instead, they have

argued that any further relief would be improper since it would "retroactively" affect the value of contributions made prior to the district court's order in this case. They contend that the *Manhart* Court's rejection of the plaintiffs' claims for retroactive relief in that case dictates that no retrospective relief is available here. Assuming, without deciding, that the part of Judge Ward's order that affects the value of contributions made prior to the entry of judgment in this case constitutes retroactive relief, nothing in *Manhart* proscribes such a result. The *Manhart* Court itself pointed out that "[t]o the point of redundancy, the statute stresses that retroactive relief 'may' be awarded if it is 'appropriate,' " 435 U.S. at 719, and that the "presumption in favor of retroactive liability can seldom be overcome." *Id.* The Court then went on to find that under the special circumstances presented in that case retroactive relief was not "appropriate." In so finding the Court stated:

> For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies. Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful . . . . [P]ension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden. *There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.*

435 U.S. at 722-23 (footnotes omitted) (emphasis added). The Supreme Court then characterized its decision as a "marked departure," 435 U.S. at 722, from past practice, and stated that since retroactive relief in the form of refunds to women of the additional moneys they had paid into the fund in the past would constitute an enormous unforeseen liability that would threaten the solvency of the fund, a "backpay award" was unjustified. In this case, however, none of the factors that influenced the *Manhart* Court is present to render "inappropriate" an order of relief that affects the value of contributions paid to the pension fund prior to the entry of judgment below. First, *Manhart* was decided by the Supreme Court over four years ago. Since the decision of that case a number of federal district courts and courts of appeals have declared plans like those at issue here to be unlawful in light of *Manhart*. *See Retired Public Employees' Association of California v. California*, 677 F.2d 733 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343 (E.D. Mich. 1979). The record indicates further that in 1974, as a result of the Secretary of Labor's public request for comments on proposed sex discrimination guidelines, TIAA-CREF wrote to its member institutions in order to encourage them to oppose regulations requiring the use of gender-neutral mortality tables. *See* JA 485-87. In addition, this suit was filed against TIAA-CREF in April, 1974. The *Peters* action was filed in 1976. 476 F. Supp.

1343, 1345. In 1978 the First Circuit reversed the Maine District Court's grant of summary judgment in favor of defendants in *EEOC v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), and remanded for further proceedings. Both *Peters* and *Colby College,* as well as other suits not yet decided, involved TIAA-CREF, and certainly put defendants TIAA-CREF on notice as to the questionability of their practices. They have had ample opportunity to "voluntarily" revise their mortality tables. The possibility of an order such as that entered by the district court, and by this court today, was foreseeable at least since 1974.[11]

It also must be recognized that the "retroactive" relief awarded here is not nearly so drastic as that sought by plaintiffs and awarded by the district court in *Manhart.* There the district court's order that all female employees and retirees receive refunds of all excess contributions made to the plan since April 5, 1972, when Title VII became applicable to governmental employers, *see Manhart v. City of Los Angeles Dept. of Water & Power,* 553 F.2d 581, 583 (9th Cir. 1976), *vacated and remanded,* 435 U.S. 702 (1978), required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves. The equalization of the amount of monthly payments to be received

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[11] The pension plan at issue in *Manhart* had been altered to equalize both contributions and benefits for male and female employees by the time that case reached the Supreme Court. The change was effective on January 1, 1975, *see* 435 U.S. at 706, prior to the affirmance of the district court's order by the Ninth Circuit. The plan at issue in *Retired Public Employees Association of California v. California,* 677 F.2d 733 (9th Cir. 1982), also was amended in 1977 to equalize contributions and benefits for male and female employees. *Id.* at 734 n.1.

by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds. A result which did not affect past contributions and granted only "prospective" relief, as that is defined by defendants, would effectively postpone full conversion to gender-neutral tables for as much as 30 to 40 years.

Finally, we must reject the argument that an award of relief that adversely affects the value of contributions made by or on behalf of male employees prior to the date of the order herein will unfairly violate those males' expectations of receiving pension benefits based on mortality tables that discriminate in their favor. First, this argument assumes that male employees had some *clearly settled* expectations that *will be* violated. On the contrary, the literature distributed to TIAA-CREF participants emphasizes the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. The literature states that:

> The amount of your retirement income will depend on the number of years you participate in the plan, the amount of premiums paid each year during your participation, your age at time of retirement, the experience of TIAA and CREF, the income option you select at retirement, and other factors. Although it is not possible to predict the effect of each of these factors upon your retirement income, the remaining portion of this booklet should be helpful in calculating the benefits that would be produced under certain conditions.

"TIAA-CREF: Your Retirement Annuity" at 14, JA 233. Later in the same publication it is stated that "[j]ust as you can't predict your future salary or retirement age,

neither can TIAA predict economic and social conditions. Therefore, the TIAA annuity amounts may be greater or less than those shown because of the following factors: . . ." *Id.* at 16, JA 234. It is then stated, *inter alia,* that on three months' notice TIAA can establish a new rate schedule for future premiums. *Id.* While TIAA does guarantee its participants certain minimal monthly payments, the amounts guaranteed are so low—since they are figured on the basis of a 2½% return on investments, *see* JA 197—that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes in the value of past benefits necessitated by the relief ordered herein.

CREF, on the other hand, guarantees plan participants no specified amount of monthly payments. The TIAA-CREF publication which explains the CREF system states that:

> The CREF annuity pays you a retirement income that varies year by year, reflecting primarily the experience of the securities in CREF's portfolio. When you retire, your accumulation units are converted into a lifetime monthly income of a fixed number of 'annuity units.' . . . The number of annuity units payable to you each month for life depends on such factors as how many accumulation units you own at time of retirement, the age at which you retire, your sex, and whether you choose an income method that continues payments to a beneficiary after your death.

"TIAA-CREF—CREF Units At Work" at 3; JA at 415. Based on statements such as this, no employees could have had settled expectations as to the amount of monthly benefits they would receive upon retirement.

While it is true that the above-quoted literature states, as does other literature sent to TIAA-CREF participants, that sex will be considered in calculating the amount of monthly benefits to be received after retirement, these statements are neither so clear, nor are they highlighted in such a way, that it is plausible to think that male plan participants relied upon them in any meaningful way. In any case, such statements would not be a major factor in inducing men to participate in TIAA-CREF plans. First, at least at LIU, participation has been mandatory for most covered employees. Second, the uniqueness of TIAA-CREF, particularly its qualities of immediate vesting and portability, would constitute inducements to participation more powerful than the belief that men's benefits would be paid at a rate higher than those paid to similarly-situated women. It is also not clear that men could actually do better purchasing a plan on the open market than they will by participating in TIAA-CREF plans that make use of gender-neutral tables, given the economies of scale that would presumably be present in the administration of such a large group plan. Further, the benefits to be received by many male participants will be unaffected by the shift to gender-neutral tables because approximately 60% of all male participants select a joint-survivor option which provides for an income that continues for the duration of their wives' lifetimes as well as their own. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550. Since in these cases actuarial projections as to the wives' likelihood of surviving, based on sex-based mortality tables, have always been figured into the calculation of the amount of benefits to be received by their husbands upon retirement, the change will have

little or no impact on the benefits to be received by these men. *Id.*[12]

Finally, reliance on the continued use of sex-distinct mortality tables by male pension plan participants was unjustified in light of the visibility of the issue of the legality of using such tables, at least since it was brought to the attention of all participants in 1973. *See* TIAA-CREF, *The Participant* (July, 1973), JA 477-84.

A delayed award such as that which defendants contend is proper would fly in the face of the primary purpose of Title VII—to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). We therefore hold that CREF was properly enjoined from using sex-distinct mortality tables to calculate the number of annuity units to which all persons retiring after May 10, 1980 are entitled, and TIAA is now similarly enjoined from using sex-distinct mortality tables to calculate the amount of monthly benefits to which its participants are entitled upon retirement. This order will affect all calculations of retirement benefits made after May 1, 1980, as per the stipulation between the parties dated March 29, 1982. JA 792-93. In addition, LIU was properly enjoined from making contributions to, or requiring its employees to make contributions to, any pension fund that continues to use gender-based mortality tables to calculate retirement benefits for employees retiring after June 1, 1980. *See* JA 792-93.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

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12 Thus, the changes mandated by this decision will reduce the benefits that would be received by approximately 40% of male TIAA-CREF participants, based on sex-distinct mortality tables, by between 1% and 8%. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550.